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EDITOR'S NOTE

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(SHOW 1 PROCEEDINGS AND ORDERS DATE: 122085

CASE NBR 85-1-00237 CFX
SHORT TITLE Henry, Artell M., et al. DOCKETED: Aug 12 1985
VERSUS Detroit Manpower Dept.

Date	Proceedings and Orders
Aug 12 1985	Petition for writ of certiorari filed.
Aug 16 1985	Supplemental brief of petitioner Artell Henry M., et al. filed.
Sep 9 1985	Brief of respondent Union Carbide Corporation in opposition filed.
Sep 9 1985	Order extending time to file response to petition until October 12, 1985.
Sep 9 1985	Above extension is for the Solicitor General.
Sep 9 1985	Brief of respondent Detroit Manpower Departments in opposition filed.
Sep 5 1985	Brief of respondents George W. Wilson, et al. in opposition filed.
Oct 11 1985	Order further extending time to file response to petition until November 12, 1985.
Oct 11 1985	Above extension of time applies to the Solicitor

CONTINUE (

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CASE NBR 85-1-00237 CFX
SHORT TITLE Henry, Artell M., et al. DOCKETED: Aug 12 1985
VERSUS Detroit Manpower Dept.

Date	Proceedings and Orders
Oct 11 1985	Above extension of time applies to the Solicitor General.
Nov 13 1985	Brief of respondent Block, Sec. of the Army in opposition filed.
Nov 20 1985	DISTRIBUTED, December 6, 1985
Nov 25 1985	Reply brief of petitioners Artell Henry M., et al. filed.
Dec 10 1985	REDISTRIBUTED, December 13, 1985
Dec 16 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

85-237

No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ARTELL M. HENRY, *et al.*,
Petitioners,

v.

CITY OF DETROIT MANPOWER DEPARTMENT, *et al.*,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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August 9, 1985

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QUESTIONS PRESENTED

In each of four unrelated civil rights cases, a district court denied an application by a *pro se* plaintiff for the appointment of counsel. Each unrepresented plaintiff immediately filed an appeal. The Sixth Circuit consolidated the four cases and appointed Cravath, Swaine & Moore as appellate counsel for the four plaintiffs specifically to consider whether an immediate appeal may be taken from an order denying the appointment of counsel and if so, whether the district courts abused their discretion by refusing to appoint counsel. The Supreme Court has never considered this question; the ten circuits that have are split six to four. A three-judge panel of the Sixth Circuit found that such an appeal could be heard and that three of the four district courts had abused their discretion in failing to appoint counsel. However, on its own motion, the Sixth Circuit reheard the matter *en banc,* vacated the decision of the panel and dismissed the appeals for want of jurisdiction under 28 U.S.C. § 1291. There were five separate opinions on the rehearing: a majority opinion, two concurring opinions and two dissenting opinions. The questions presented are:

1. Is a district court's denial of a *pro se* plaintiff's request for the appointment of counsel subject to immediate appeal?

2. If so, did the four district courts abuse their discretion by denying the requests for appointed counsel?

PARTIES TO THE PROCEEDINGS

Four cases were consolidated below for the purpose of appeal. In the first action, the petitioner is Artell M. Henry, and the respondent is the City of Detroit Manpower Department. In the second, the petitioner is Norman E. Cox, and the respondent is the Union Carbide Corporation. In the third, the petitioner is Douglas L. Gordon, and the respondents are George Wilson, Al Parke, and Dr. Hodge (representing the State of Kentucky Department of Corrections). In the fourth, the petitioner is Ronny Lee Parrish and the respondent is John O. Marsh, Jr., Secretary of the Army.

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v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Henry, Gordon, Cox, and Parrish ("Petitioners") respectfully pray that writs of certiorari issue to review an order of the United States Court of Appeals for the Sixth Circuit dismissing their appeals from district court orders denying appointment of counsel. If the petitions are granted, petitioners also respectfully request that the four cases be consolidated for the purpose of consideration by the Supreme Court, as they were in the Sixth Circuit.

OPINIONS BELOW

The July 20, 1984, opinion of the Sixth Circuit, holding that orders denying appointment of counsel are immediately appealable and that such orders in the cases of petitioners Cox, Gordon and Parrish constituted an abuse of the district courts' discretion, is attached as Appendix A. The May 22, 1985, opinion of the Sixth Circuit on rehearing *en banc,* vacating the panel's opinion and dismissing the appeals for want of jurisdiction, is attached as Appendix B. The mandates have been stayed to permit the filing of this petition.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit, sitting *en banc,* dismissing petitioners' appeals was entered on May 22, 1985. (App. B-3). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute whose construction is here at issue is 28 U.S.C. § 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17, authorizes the appointment of counsel in Title VII suits at 42 U.S.C. § 2000e-5(f)(1)(B):

> "Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security . . . ."

The general federal *in forma pauperis* statute provides in relevant part, 28 U.S.C. § 1915(d):

> "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

STATEMENT OF THE CASE

I. The District Court Orders Denying Counsel.

Each of the four petitioners sought and was denied appointed counsel in the preliminary stages of a civil rights suit. Three are Title VII actions. Petitioner Henry, in the United States District Court for the Eastern District of Michigan, alleges that respondent City of Detroit Manpower Department denied him equal pay and unfairly terminated him because of his Jamaican national origin. Petitioner Cox, in the United States District Court for the Eastern District of Tennessee, alleges racial discrimination consisting of on-the-job harassment and unfair termination from his job with Union Carbide Corporation. Petitioner Parrish, in the United States District Court for the Western District of Kentucky, alleges harassment and the unfair stripping of supervisory duties from his job at a United States Army hospital. The fourth suit, by petitioner Gordon in the United States District Court for the Western District of Kentucky, is a prisoner's § 1983 action alleging unconstitutional withholding of medical treatment.

Jurisdiction in the district courts exists for all cases under 28 U.S.C. §§ 1331 and 1343, and for the Title VII cases additionally under 42 U.S.C. § 2000e-5(f)(3).

Each petitioner promptly appealed to the Sixth Circuit from the district court's denial of counsel. The Sixth Circuit consolidated the cases for purposes of briefing and oral argument, and appointed Cravath, Swaine & Moore to represent the petitioners on their appeals. Cravath does not represent petitioners for any other purpose.

II. The Initial Appellate Court Findings of Reviewability and Abuse of Discretion.

A panel of the Sixth Circuit held that denials of motions by *pro se* plaintiffs to appoint counsel are final decisions that are appealable under 28 U.S.C. § 1291. The court reasoned that its holding was required in order to carry out Congress' express intent to assure civil rights plaintiffs full and equal access to the federal courts. The complexity of civil rights litigation and the resources available to defendants in civil rights cases guarantees "the futility . . . [of] proceeding pro se after rejection of such a motion for appointment of counsel", said the court. "As Congress recognized, rejecting such a motion means that the final curtain drops before the play begins." (App. A-6).

The court found that the appeals qualified under the "collateral decision" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as elucidated by *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), *i.e.*, to be immediately appealable, an order must be final, separable from the merits of the case, and not effectively reviewable on appeal from the final judgment. (App. A-9, A-13-A-14).

On the merits, the panel held that the district court in *Henry v. City of Detroit* acted within its discretion, but that the district courts in *Parrish v. Marsh* and *Cox v. Union Carbide* abused their discretion in failing to appoint counsel or in failing to conduct proper hearings, respectively. (App. A-18-A-19). The district court in *Gordon v. Wilson* was found to have abused its discretion by failing to review *de novo* a magistrate's refusal to appoint counsel. (App. A-19).

III. The *En Banc* Opinion Dismissing the Appeals for Want of Jurisdiction.

The Sixth Circuit ordered a rehearing *en banc* on its own motion. The rehearing, which none of the defendants sought, resulted in a thoroughly divided Court. The majority opinion, joined in by eight judges, dismissed all appeals on jurisdictional grounds, finding that the orders being appealed met *none* of the

Coopers & Lybrand requirements of finality, separability, and effective unreviewability. A concurring opinion held that only the finality requirement had been met. Two dissenting opinions, joined in by four judges, would have found the orders appealable. One of those opinions would have carved out a special exception for civil rights cases.[1]

REASONS FOR GRANTING THE WRITS

I. The Court Should Grant the Writs to Resolve a Conflict Among the Circuits.

Four circuits have held that orders denying motions to appoint counsel for *pro se* civil rights plaintiffs are immediately appealable[2]; five circuits, excluding the Sixth, have held that they are not.[3] This Court has never considered the question. In light of the thorough exposition of the arguments in the circuits for and against appealability, the question is ripe and appropriate for Supreme Court review; no purpose would be served by waiting for consideration by the two remaining circuits.

Last year, in *Flanagan v. United States*, 104 S. Ct. 1051, 1052 (1984), this Court held that orders granting motions to disqualify counsel are not immediately appealable. Since then, three circuit courts have addressed the issue presented here.

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[1] The opinions are reproduced as Appendix B. The court expressly held that, for purposes of appealability, there was no difference between 42 U.S.C. § 2000e-5(f)(1)(B) and 28 U.S.C. § 1915(d). (App. B-5). Other courts are in agreement, and petitioners do not contest that holding. *See, e.g., Slaughter v. City of Maplewood*, 731 F.2d 587, 589 (8th Cir. 1984).

[2] *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984); *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340 (11th Cir. 1983) (adopting as precedent *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1979)); *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981).

[3] *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984); *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390 (10th Cir. 1981); *Miller v. Pleasure*, 425 F.2d 1205 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970).

The Fifth and Eighth Circuits reaffirmed their rule of immediate appealability; the Third Circuit took the opposite position.[4] Thus, although this Court has addressed the immediate appealability of other sorts of orders on several occasions during the past three years, the circuits remain split and have not found those opinions to be of sufficient guidance to enable them uniformly to decide the question presented here.

In the two cases decided by the Court last term, *Richardson-Merrell, Inc. v. Koller,* 105 S. Ct. 2757, 2763 (1985) and *Mitchell v. Forsyth,* 105 S. Ct. 2806, 2817 (1985) this Court held that an order disqualifying counsel was not immediately appealable, but that an order denying qualified immunity to a government official was. Although the circuits have not had an opportunity to assess the impact of those opinions on the issue here, we respectfully submit that those opinions do not resolve the issue presented and that without definitive guidance from this Court, the circuits will remain split.

II. The Court Should Grant the Writs Because Orders Denying Appointment of Counsel are Immediately Reviewable under the *Cohen* Doctrine.

An order denying appointment of counsel meets the three-part *Coopers* test used to determine the applicability of the *Cohen* doctrine. It is final, separable from the merits of the case, and effectively unreviewable on appeal from a final judgment.

A. *Finality.*

Any order except "those as to which some revision might reasonably be expected in the ordinary course of litigation" meets the finality requirements of the *Coopers* test. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 12-13 n.14 (1983). Because there is no reason to expect revision of orders denying appointment of counsel during trial,

[4] *Robbins,* 750 F.2d at 413; *Slaughter,* 731 F.2d at 588; *Smith-Bey,* 741 F.2d at 26.

such orders are exactly the same in this respect as other orders which have been found to be final, *e.g., Abney v. United States,* 431 U.S. 651, 659 (1977) (rejection of double jeopardy claim); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 375 (1981) (denial of motions to disqualify counsel in a civil case); *Flanagan,* 104 S. Ct. at 1057 (granting disqualification of counsel in a criminal case). There is no doubt, therefore, that the requirement of finality is met. Respondents below did not argue otherwise although the Sixth Circuit, *en banc,* erroneously held that the orders were not "final", creating for the first time a judicial "presumption" that such orders are "tentative". (App. B-8-B-9).[5]

B. *Separability.*

The decision to appoint counsel for a *pro se* plaintiff is clearly collateral to the principal issues in the case. Merely because a district court must satisfy itself that plaintiff has "some chance of prevailing" before appointing counsel, *see Poindexter v. Federal Bureau of Investigation,* 737 F.2d 1173, 1187 (D.C. Cir. 1984), does not mean that it has made a finding on the merits. Similar preliminary determinations are required in analogous situations where separability has been found, *e.g., Stack v. Boyle,* 342 U.S. 1, 5 n.3 (1951) (bail determination); *Mitchell,* 105 S.Ct. at 2817 (qualified immunity); *see Roberts v. United States,* 339 U.S. 844 (1950) (proceedings *in forma pauperis*).

If, in order to establish that an order is separable, an appellate court must presume that prejudice would result from

[5] Such a holding is plainly wrong. If counsel is erroneously denied at the beginning of a case, for example, the error is not cured simply by appointing counsel on the last day of the trial. The first denial is clearly "final" insofar as it applies to the appointment of counsel *at that stage of the proceedings.* Moreover, as the concurring opinion of Judge Contie noted below, the general principle is that even if a district court retains jurisdiction to alter a prior ruling, "a district court nevertheless conclusively decides an issue so long as no further consideration of the issue is contemplated". (App. B-16). Judge Contie would have held the orders to be final.

an improper denial, such a presumption should be made here.[6] The circuits that have considered that question have found that prejudice is invariably the result of an improper denial of counsel.[7]

C. *Effective Unreviewability.*

This is the issue that most divides the circuits. Under *Cohen*, a trial court's refusal to appoint counsel will be "effectively unreviewable" if, at the time of a final disposition on the merits, "it will be too late effectively to review the present order, and the rights conferred by . . . statute . . . will have been lost, probably irreparably". *Cohen*, 337 U.S. at 546. There are two reasons why an order denying counsel meets that test.

1. *An erroneous refusal to appoint counsel will often effectively terminate an action.*

A major study of the *pro se* litigant in federal court compares him to a "blind man . . . [in] a very complex maze", and demonstrates that the overwhelming majority of *pro se* suits are "terminated in summary fashion", sometimes without even

[6] In *Flanagan*, 104 S. Ct. at 1056, this Court determined that, if orders disqualifying counsel in criminal proceedings could be reversed only on a showing of actual prejudice, such orders were not separable for *Cohen* purposes. The analysis was extended to disqualifications in civil cases in *Richardson-Merrell*, 105 S. Ct. at 2765. In both cases, the Court declined to rule on whether a showing of prejudice is in fact required for reversal.

[7] *See, e.g., Appleby v. Meachum*, 696 F.2d 145, 147 (1st Cir. 1983) ("We believe that if the district court erred at the outset in denying appointed counsel, its error would be presumptively prejudicial."); *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301, 1313 (9th Cir. 1981) (improper denial of counsel is "inherently prejudicial"). Some circuits which do not allow immediate appeal do not presumptively find prejudice in the improper denial of a request for appointed counsel. In those circuits, a finding of an improper denial leads to a hearing before the district court on the issue—a hearing at which the plaintiff *must have an attorney*. *Jenkins v. Chemical Bank*, 721 F.2d 876, 880 (2d Cir. 1983); *Poindexter*, 737 F.2d at 1192. Those courts do not entangle themselves with the merits of the case; separability, therefore, is not compromised. *But see Brown-Bey v. United States*, 720 F.2d 467 (7th Cir. 1983).

the formalities of responsive pleadings. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 201-202 (1972). An indigent plaintiff in a civil rights suit has little hope of prosecuting his case to a final judgment on the merits and "even less hope" that there will ever be an appeal. *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301, 1310 (9th Cir. 1981).

Many indigent plaintiffs, faced with the daunting prospect of carrying a case forward without counsel, will simply drop their complaints when their requests for assistance are denied. *Id.* Plaintiffs without counsel are often incapable of shouldering the most elementary burdens of a lawsuit. Zeigler & Hermann, *supra*, at 181-82; Schmertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 Fed. B.J. 235, 243 (1967). *See also Berndt v. Stinson*, 562 F. Supp. 28 (E.D. Tenn. 1982), *appeal dismissed*, 708 F.2d 721 (6th Cir. 1983) (dismissing *pro se* action for untimely filing of complaint).

Additionally, *pro se* plaintiffs frequently make simple errors that prevent an appellate court from reviewing the merits of their suits. *See, e.g., McKnight v. United States Steel Corp.*, 726 F.2d 333, 336, 338 (7th Cir. 1984) (refusing to reverse improper dismissal of *pro se* Title VII suit because appeal was brought under the wrong Federal Rule); *Shah v. Hutto*, 722 F.2d 1167, 1168 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2354 (1984) (dismissing prisoner's attempted appeal from summary judgment in § 1983 action because notice of appeal was received one day late).[8]

Thus, those circuits that have precluded immediate appeal in reliance on this Court's opinion in *Firestone*[9] have missed the crucial distinction that in *Firestone* the parties were at all times represented by counsel; there was no possibility that laymen's blunders would vitiate effective review.

[8] Other examples of *pro se* plaintiffs' loss of the right to appeal due to simple procedural errors are found in *Bolden v. Odum*, 695 F.2d 549, 550 (11th Cir. 1983); *Mayfield v. United States Parole Comm'n*, 647 F.2d 1053, 1054-55 (10th Cir. 1981); *Covington v. Allsbrook*, 636 F.2d 63, 64 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981); *Silver v. Laurie*, 594 F.2d 892, 893 (1st Cir. 1979).

[9] *E.g., Randle*, 664 F.2d at 1066; *Cotner*, 657 F.2d at 1392.

In sum, the orders here are effectively unreviewable because *pro se* plaintiffs, wrongly denied legal assistance, are unlikely to and in most cases simply cannot carry their cases forward to a final judgment. As the Fifth Circuit aptly observed:

> "[I]t is the likelihood that a litigant will not be able effectively to prosecute his claim or to appeal that determines the reviewability of that claim rather than the theoretical existence of the right to proceed with a claim." *Robbins v. Maggio,* 750 F.2d 405, 413 (5th Cir. 1985).

2. *Pro Se Plaintiffs Cannot Be Made Whole in a Second Trial.*

In the unlikely event that a *pro se* litigant does reach a final judgment and perfects an appeal without assistance, it will be impossible as a practical matter for an appellate court at that point to repair most of the errors and deprivations that may have resulted due to the absence of counsel.

A *pro se* plaintiff

> "[w]ould be bound by the inevitable prejudicial errors she would make at her first trial should she manage subsequently to obtain a reversal and a new trial. She could, for example, be bound by or impeached with her earlier testimony, or suffer adverse consequences from uninformed and unwise stipulations." *Bradshaw,* 662 F.2d at 1311-12.

Moreover, as the plaintiff waits for the chance to appeal the denial of his request for counsel, undeposed witnesses may die, disappear or forget; undiscovered documents may be destroyed; unfollowed leads may dry up. As this Court has stressed, delay that results in this sort of irreparable harm can and should be avoided. *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 153 (1964).

Thus, the total absence of counsel is the crucial fact that justifies immediate appeal from orders refusing to appoint counsel and that distinguishes this case from cases involving

disqualifications of counsel. An erroneous order denying counsel works an irreparable loss on poor plaintiffs. As Judge Jones said in his dissent from the *en banc* majority opinion below, the notion that *pro se* plaintiffs are capable of perfecting and conducting appeals on their own "wars with reality". (App. B-32).

III. The Court Should Grant the Writs Because Immediate Review Serves the Needs of Justice and of Efficient Judicial Administration.

The *Coopers* test is a valuable tool for determining whether immediate review of a collateral order serves the policies embodied in the rule that only "final decisions" may be appealed.[10] In *Richardson-Merrell* the goals served by finality were identified as efficient administration, maintenance of the proper relationship between trial and appellate courts, and the avoidance of disruption and delay of civil proceedings. 53 U.S.L.W. at 4774. Immediate review of orders denying a request for counsel in civil matters will promote those goals.

A. *Promotion of Efficient Judicial Administration.*

The immediate reversal of an erroneous denial of counsel relieves "the defendant, and the court, from the need to muddle through a sham of a trial, subsequent appeal, and another trial and appeal following the appointment of counsel". *Bradshaw,* 662 F.2d at 1315. The savings to the litigants and the courts are manifest.[11]

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[10] The collateral order doctrine is often described as an "exception to the final judgment rule", *Richardson-Merrell,* 105 S. Ct. at 2761. The doctrine is not an exception to § 1291 itself, of course. It is a necessary concommitant to the rule's rough approximation of the Congressional prohibition of appeals from all except "final decisions". *See Abney v. United States,* 431 U.S. 651, 658 (1977).

[11] The difference between this case and *Richardson-Merrell*—in which orders disqualifying civil plaintiffs' counsel were held not to be final decisions—is the almost certain absence of meaningful proceedings without counsel: "[It is] the prospect that any meaningful litigation must await appointment of counsel, that we discuss here". *Bradshaw,* 662 F.2d at 1315 n.36.

Consider these cases as an example. Here, because the Sixth Circuit's panel ruled on the merits of the appeals before being reversed on jurisdictional grounds by the full Sixth Circuit, we know that in three cases the district courts abused their discretion by refusing to appoint counsel. Therefore, if the Sixth Circuit's jurisdictional ruling stands, at least three of the four cases must be reversed on final appeal (assuming, of course, there is one) no matter what happens below and no matter how long it takes. That cannot be a result that is consistent with efficient judicial administration.

The efficiency of immediate review is enhanced here because these appeals are relatively easy to decide. The decision to appoint an attorney is left to the discretion of the district court. *See, e.g., Jenkins v. Chemical Bank,* 721 F.2d 876, 879 (2d Cir. 1983); *Bradshaw,* 662 F.2d at 1318; *White v. United States Pipe & Foundry Co.,* 646 F.2d 203, 205 (5th Cir. 1981). The appellate court in such circumstances must satisfy itself merely that the district court's "judgment [has been] guided by sound legal principles". *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 416 (1975) (quoting *United States v. Burr,* 25 F.Cas. 30, 35 (C.C.Va. 1807) (No. 14,692d) (Marshall, C.J.)).

B. *Maintenance of the Proper Relationship of Trial and Appellate Courts.*

The observation in *Richardson-Merrell* concerning "the deference appellate courts owe to the district judge's opinion" on issues arising before judgment reiterates one of the central concerns of the doctrine of finality. 105 S. Ct. at 2761. An earlier Court termed the doctrine "a phase of the distribution of authority within the judicial hierarchy". *Cobbledick v. United States,* 309 U.S. 323, 330 (1940). The trial court's independent authority must be balanced with the appellate court's responsibility to correct error.

Here, however, if the appellate court does not hear the interlocutory appeals of these plaintiffs, it may never hear them at all. As the Court said in *Mathews v. Eldridge,* finality must

be construed "so as not to cause crucial collateral claims to be lost". 424 U.S. 319, 331, n.11 (1976).

C. *The Prevention of Delay.*

This Court has said recently that it is concerned with the use of interlocutory appeals as a technique to delay and obstruct the progress of civil proceedings. *Firestone,* 449 U.S. at 374; *Richardson-Merrell,* 105 S. Ct. at 2762. But *pro se* plaintiffs have absolutely nothing to gain by delaying their own actions. When counsel is erroneously denied, on the other hand, delay is the almost invariable result. *See* Zeigler & Hermann, *supra,* at 198-206. It is the absence of a lawyer for the plaintiff that distinguishes this case from *Richardson-Merrell* and *Firestone;* there, the district court's ruling on the disqualification motion had no effect on the balance of technical proficiency between the parties. Here, the drastic imbalance in such proficiency that occurs from an erroneous decision can only result in a proceeding that is a model of delay, obstruction and the needless expenditure of judicial resources.

IV. The Court Should Grant the Writs to Enable Plaintiffs to Vindicate Their Civil Rights.

Congress realized that *pro se* civil rights plaintiffs face nearly insuperable odds in their suits against the typical defendant and for that reason it authorized district courts to appoint counsel for them:

> "[I]t is important to note that subsection 715(a) in the bill provides that where the individual has elected to pursue his action in the court, the court may, in such circumstances as it deems just, appoint an attorney for the complainant and authorize the commencement of the action without the payment of fees, costs or security. By including this provision in the bill, the committee emphasizes that the nature of Title VII actions more often than not pits parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not

infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent. . . .

"The complexity of many of the charges, and the time required to develop the cases, is well recognized by the committee. . . . The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." H.R. Rep. No. 238, 92d Cong., 2d Sess. *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2148.

Often, it is simply not possible as a practical matter for a civil rights plaintiff to proceed without counsel. The experience of *pro se* litigants reveals that

"[t]he assistance of counsel is the most important prerequisite to obtaining fair review of federal claims . . . There is simply no other way to assure *pro se* litigants substantial justice, short of . . . implementing radically revised court procedures." Zeigler & Hermann, *supra*, at 211-12 (1972).

See also Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977); *Bradshaw*, 662 F.2d at 1310.

Of course, many *pro se* plaintiffs never reach the appellate courts at all, having either abandoned the litigation or lost the right to appeal due to a procedural error. Given the importance of counsel's role in vindicating civil rights claims (it is unlikely that this petition would even have been filed had the Sixth Circuit not appointed appellate counsel) and the importance that Congress attached to the appointment of counsel for indigent civil rights plaintiffs, it is hollow indeed to assert that the wrongful denial of counsel can be remedied on final appeal. In most cases, there simply will not be any final appeal.

The problem is not isolated. Aside from the cases at issue here, recent reported opinions reveal over twenty other exam-

ples of abuse of discretion in denials of requests for counsel.[12] Since the test for the appointment of counsel is straightforward, it is hard to explain the fact that district courts continue to misapply or ignore it. Postponing appellate review until appeal from a final judgment will serve only to encourage such behavior on the part of the district courts and will as a practical matter make it impossible for *pro se* plaintiffs ever to vindicate their civil rights.

V. The Court Should Grant the Writs Because the District Courts Abused Their Discretion in Denying Requests for Appointed Counsel In These Cases.

On a full briefing of the issues in this Court, petitioners would set forth the errors amounting to abuse of discretion in the trial courts below. The one appellate court to address the issue on the merits, the original three-judge panel of the Sixth Circuit, found abuse of discretion in the cases of three of the four petitioners. We further believe and would show that in the fourth case, that of petitioner Henry, the district court also abused its discretion.

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[12] *Jenkins v. Chemical Bank*, 721 F.2d 876 (2d Cir. 1983); *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984); *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Neal v. International Ass'n of Machinists, Local Lodge 2386*, 722 F.2d 247 (5th Cir. 1984); *Branch v. Cole*, 660 F.2d 623 (5th Cir. 1982); *Luna v. International Ass'n of Machinists*, 614 F.2d 529 (5th Cir. 1980); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977); *Brown-Bey v. United States*, 720 F.2d 467 (7th Cir. 1983); *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir.) *cert. denied* 104 S. Ct. 434 (1983); *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982); *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981); *Jones v. WFYR Radio*, 626 F.2d 576 (7th Cir. 1980); *Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984); *White v. Walsh*, 649 F.2d 560 (8th Cir. 1981); *Manning v. Lockhart*, 623 F. 2d 536 (8th Cir. 1980); *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981); *McCarthy v. Weinberg*, 753 F.2d 836 (10th Cir. 1985); *Poindexter v. Federal Bureau of Investigation*, 737 F.2d 1173 (D.C. Cir. 1984); *Camps v. C & P Telephone Co.*, 692 F.2d 120 (D.C. Cir. 1982); *Hilliard v. Volcker*, 659 F.2d 1125 (D.C. Cir. 1981).

CONCLUSION

In view of the foregoing, writs of certiorari should issue to the United States Court of Appeals for the Sixth Circuit, so that this Court may resolve the important issues raised in this petition.

August 9, 1985

Respectfully submitted,

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[13] Graciela M. Rodriguez and Jonathan S. Sack, law students in the Cravath, Swaine & Moore summer program, assisted in the preparation of this petition.

APPENDIX A

OPINION OF THE COURT OF APPEALS,

JULY 20, 1984

Nos. 81-1767, 81-5827, 81-5878, 82-5009

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

July 20, 1985

ARTELL M. HENRY, (81-1767)
Plaintiff-Appellant,

v.

CITY OF DETROIT MANPOWER DEPARTMENT,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

DOUGLAS L. GORDON, (81-5827)
Plaintiff-Appellant,

v.

GEORGE WILSON, AL PARKE, DR. HODGE,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky.

NORMAN E. COX, (81-5878)
Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

RONNY LEE PARRISH, (82-5009)
Plaintiff-Appellant,

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Before: EDWARDS and KRUPANSKY, Circuit Judges; and BROWN, Senior Circuit Judge.

EDWARDS, Circuit Judge, delivered the opinion of the Court, in which KRUPANSKY, Circuit Judge, joined. BROWN, Senior Circuit Judge, (pp. 20-30) filed a separate dissenting opinion.

EDWARDS, Circuit Judge. The plaintiffs in these civil rights actions appeal from denial by four different District Courts of their motions for appointment of counsel. The immediately controlling issue in each case is whether or not denial of counsel is an appealable final order. The four cases have been consolidated for appellate decision.

Each of these cases is entirely separate and distinct. None has been the subject of trial on the merits in the District Court. In one of them, the District Judge did attempt to comply with the purposes of the federal equal employment opportunity statutes involved by making two appointments of counsel and seeking to make another. We cannot appropriately, however, decide whether dismissal of even this complaint is appropriate without first deciding whether or not these appeals are viable.

In another case, *Parrish* v. *Marsh*, the District Judge made a genuine effort to ascertain whether Parrish's claim had merit. The problem with failure to appoint counsel, no matter how carefully the District Judge sought to handle the matter without appointing counsel, is probably illustrated best in *Parrish* in the context of a claim of racial discrimination where appellant's ultimate rights may have been seriously and adversely affected by lack of a lawyer for purposes of investigation, organization of evidence and filing of an adequate complaint. Of course it is likewise possible that at trial, even with legal representation, each of these cases could prove to be frivolous. The point is that without at least the investigation

by competent counsel, no one will ever know the answer to that question.

We hold that all four of these cases are appealable.

Each of these cases was filed under one of the following statutes where Congress specifically recognized the need for legal representation: Title VII of the Civil Rights Act of 1964, Sec. 706(f)(1)(B), 42 U.S.C. § 2000e-5(f)(1)(B) (1976), provides:

> Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security.

Title 28 U.S.C. § 1915(d) provides:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

In the Civil Rights Act, Congress clearly recognized 1) that many civil rights grievants would be likely to be indigent and "unable to employ counsel," and 2) that the very nature of the litigation authorized was likely to be complex so as to require counsel for preparation and presentation in court. Congress also demonstrated its concern by waiving payment of fees, costs and security. (Congress however, did not provide for payment of legal fees but apparently thought it appropriate for members of the bar to handle these cases through pro bono service after appointment by federal courts.) It did provide for federal courts to award fees to a prevailing party. *See* 42 U.S.C. § 2000e-5(k).

This Court now holds that a citizen seeking to file a civil rights complaint has a right of appeal from a denial of appointment of counsel because of 1) the concerns expressed in the

legislative history of the Civil Rights Act; (2) applicable Supreme Court case law; 3) precedent in the majority of the circuits which have spoken on the issue and 4) the closest applicable case law in this circuit.

I. Legislative History

Congress has indicated its understanding of the difficulties faced by civil rights litigants.

> *It is important to note that subsection 715(a) in the bill provides that where the individual has elected to pursue his action in the court, the court may, in such circumstances as it deems just, appoint an attorney for the complainant and authorize the commencement of the action without the payment of fees, costs or security. By including this provision in the bill, the committee emphasizes that the nature of Title VII actions more often than not pits parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent.*
>
> • • • •
>
> *The complexity of many of the charges, and the time required to develop the cases, is well recognized by the committee. It is assumed that individual complainants, who are apprised of the need for the proper preparation of a complex complaint involving multiple issues and extensive discovery procedures, would not cut short the administrative process merely to encounter the same kind of delays in a court proceeding. It would, however, be appropriate for the individual to institute a court action where the delay is occasioned by administrative inefficiencies. The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available.*

H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News, 2137, 2148 (emphasis added).

As indicated above, the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f)(1)(B) provides:

> Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security.

This provision resembles 28 U.S.C. § 1915(d) enacted in 1892 for plaintiffs proceeding in forma pauperis in civil actions: "The court may request an attorney to represent any such person unable to employ counsel."

Prior to 1972 the EEOC had only conciliation powers in obtaining compliance with Title VII of the 1964 Civil Rights Act. Congress significantly strengthened the enforcement powers of the EEOC in 1972 because of dissatisfaction with implementation of Title VII. While empowering the EEOC to initiate litigation on behalf of Title VII complainants, the 1972 Amendments also re-enacted the provisions authorizing private individuals to initiate their own civil actions. House Report No. 92-238 on the Equal Employment Opportunity Act of 1972 explains the importance of re-enacting the 1964 language on court appointed counsel. Because of EEOC staff shortages, parties had had to wait up to three years for final conciliation procedures to be instituted.

> This situation leads the committee to believe that the private right of action, both under the present act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.

1972 U.S. Code Cong. & Ad. News, 2137, 2147-48.

As previously pointed out, Congress recognized that a civil rights "complainant who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent."

This imbalance in civil rights litigation is at the center of the right to counsel issue because it illustrates the futility (probably impossibility) of a civil rights plaintiff who is unable to hire counsel proceeding pro se after rejection of such a motion for appointment of counsel. As Congress recognized, rejecting such a motion means that the final curtain drops before the play begins.

II. Supreme Court Precedent

We turn now to Supreme Court precedent which establishes guidelines on the issue of when an order is "final" for purposes of immediate appealability under 28 U.S.C. § 1291. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court defined the circumstances under which appeals may be taken before ultimate decision by the District Court. The appeal involved a district court's refusal to apply a state statute requiring a plaintiff in a shareholder's derivative action to post security for costs.

> At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U.S.C. § 1291 provides, as did its predecessors, for appeal only, "from all final decisions of the district courts," except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments *when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those*

> *final judgments which terminate an action, this order would not be appealable.*
>
> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeney*, 1 Pet., 567, 569; *United States* v. *River Rouge Co.*, 269 U. S. 411, 414; *Cobbledick* v. *United States*, 309 U. S. 323, 328.

Id. at 545-46 (emphasis added).

Each of the appeals which we deal with in this case likewise "appears to fall in that small class which finally determines rights separable from and collateral to rights asserted in (these) actions." They present an issue which is not an "ingredient" of the cause of action. They are easily separable from the cause of action. To the plaintiffs concerned, as Congress recognized, appointment of counsel is "too important to be denied review."

In *Roberts* v. *U.S. District Court*, 339 U.S. 844 (1950), a case subsequent to the *Cohen* case involving an imprisoned plaintiff who had been denied in forma pauperis appeal, the Supreme Court held:

> The denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order. 28 U. S. C. § 1291; see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

The *Roberts* per curiam, quoted above should be read as closely applicable to and controlling of the instant cases which are before this court. In granting in forma pauperis appeal, the Supreme Court pointed directly to *Cohen* v. *Beneficial Industrial Loan Co*. The *Roberts* case has never been overturned or modified.

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the Supreme Court held that an order *denying a motion to disqualify plaintiff's opponent's chosen counsel* was not a final and appealable order. Contrary to the situations with which we deal, however, no party in the *Firestone* case was denied counsel. Nor was any party ever denied the counsel of its own first choice. Further, as the court pointed out, the District Court, after trial, could reassess the merits of the disqualification motions, if the facts at trial justified, and grant a motion for new trial. *Firestone* clearly does not mandate denial of appeal in our instant cases.

In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), the

Supreme Court dealt with and established the non-appealability of denial of a prejudgment order denying *class certification.* It is not germane to this appeal.[1]

Quotation of Justice Stevens' opinion for a unanimous court applies the "collateral exception rule" and "death knell doctrine" to a class certification issue quite distinct from the question of representation raised on this appeal.

I.

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.
>
> • • •
>
> An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Fed. Rule Civ. Proc. 23 (c)(1). Second, the class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 558. Finally an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385. For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case.

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[1] The Supreme Court has decided that denial of a motion to proceed in forma pauperis is immediately appealable (*Roberts*), but that denial of class certification is not immediately appealable (*Coopers & Lybrand*). The dissent lists various exceptions to the final judgment rule made after *Cohen*, but never mentions *Roberts*. Denial of appointed counsel resembles denial of a motion to proceed in forma pauperis far more than it resembles denial of class certification. The result in this case is governed more by *Roberts* than by *Coopers & Lybrand*.

II.

Several Circuits, including the Court of Appeals in this case, have held that an order denying class certification is appealable if it is likely to sound the "death knell" of the litigation. The "death knell" doctrine assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination. Without questioning this assumption, we hold that orders relating to class certification are not independently appealable under § 1291 prior to judgment.

• • •

The finality requirement in § 1291 evinces a legislative judgment that "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 170. Although a rigid insistence on technical finality would sometimes conflict with the purposes of the statute, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, even adherents of the "death knell" doctrine acknowledge that a refusal to certify a class does not fall in that limited category of orders which, though nonfinal, may be appealed without undermining the policies served by the general rule.

> Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a "final decision" within the meaning of § 1291.

437 U.S. at 468, 469, 471, 477 (citations and footnotes omitted).

There is no suggestion in the *Coopers & Livesay* opinion that counsel would be unavailable for either the present plaintiffs or members of the class or that either would be

unable to prosecute their claims. Nor are any of the other reasons for denial of immediate review applicable to our instant case.

We now turn to the latest decision of the United States Supreme Court concerning the interpretation of the finality rule in Justice O'Connor's opinion for a unanimous Supreme Court in *Flanagan* v. *United States*, — U.S. ——, 104 S. Ct. 1051 (1984). In *Flanagan*, the Court dealt with a District Court pre-trial order disqualifying a defendant's law firm in a prospective criminal trial. The court emphasized the need for avoiding delay in criminal trials saying:

> More than 40 years ago the Court noted that the reasons for the final judgment rule are "especially compelling in the administration of criminal justice." *Cobbledick* v. *United States*, *supra*, 309 U.S., at 325, 60 S.Ct., 541. Promptness in bringing a criminal case to trial has become increasingly important as crime has increased, court dockets have swelled, and detention facilities have become overcrowded.
>
> As the Sixth Amendment's guarantee of a Speedy Trial indicates, the accused may have a strong interest in speedy resolution of the charges against him. In addition, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U.S. 514, 519, 92 S.Ct. 2182, 2186, 33 L.Ed.2d 101 (1972). As time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote. Delay increases the cost of pretrial detention and extends "the period during which defendants released on bail may commit other crimes." *United States* v. *MacDonald*, 435 U.S. 850, 862, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18 (1978). Delay between arrest and punishment prolongs public anxiety over community safety if

a person accused of a serious crime is free on bail. It may also adversely affect the prospects for rehabilitation. See *Barker* v. *Wingo*, *supra*, 407 U.S., at 520, 92 S.Ct., at 2187. Finally, when a crime is committed against a community, the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. Prompt acquittal of a person wrongly accused, which forces prosecutorial investigation to continue, is as important as prompt conviction and sentence of a person rightly accused. Crime inflicts a wound on the community, and that wound may not begin to heal until criminal proceedings have come to an end.

• • •

Because of the compelling interest in prompt trials, the Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases.

104 S. Ct. at 1054, 1055.

Justice O'Connor also emphasized that the disqualification of counsel issue would be subject to review as an issue in the appeal of any guilty verdict. Obviously neither of these bases for decision are applicable to these four civil rights appeals. The defendants in *Flanagan*, while unable to have counsel of choice, would still be represented at trial and on appeal. In civil rights cases indigent plaintiffs without any representation would rarely, if ever, complete trial and perfect an appeal. The compelling interest in a prompt criminal trial for the *Flanagan* defendants does not apply in trials of civil rights claims brought by indigent plaintiffs. Two Circuits have held that *Flanagan* does not prevent immediate appeal when counsel has been disqualified in a civil case. *Koller* v. *Richardson-Merrell, Inc.*, No. 84-5039 (D.C. Cir. May 29, 1984); *Interco Systems Inc.* v. *Omni Corporate Services*, Nos. 84-7008, 84-7012 slip op. at 3334 (2d Cir. Apr. 30, 1984). The final judgment rule should not defeat the congressional effort to obtain civil enforcement of the civil rights laws.

III. Precedent In The Courts of Appeals

We turn to precedent on this issue in the various courts of appeals. There are four circuits which have held that an impoverished civil rights plaintiff who seeks and is denied appointed counsel has a right to an interlocutory appeal. Two of these cases preceded decision in the *Firestone* case. Two followed *Firestone*. Arranged in reverse order of decision they are as follows: *Ray* v. *Robinson*, 640 F.2d 474 (3rd Cir. 1981); *Bradshaw* v. *Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981); *Hudak* v. *Curators of the University of Missouri*, 586 F.2d 105 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979); *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977).

Judge Reinhardt's decision for a Ninth Circuit panel in the *Bradshaw* case cited above provides an excellent discussion of the applicable and controlling law. Concerning the three *Cohen* issues of Finality, Separability and Effective Review, he has included the following paragraphs which I have chosen as summaries of each argument.

1. *Finality*

The first, and perhaps the simplest, requirement derives from the relation between trial and appellate courts. Section 1291 serves to preserve that relation as one of review, not supervision. Thus the decision of the district court on the particular point at issue should be final. This criterion is satisfied here in that the district court has clearly said its last word on the subject of appointment of counsel, in no way indicating that its order was tentative. Indeed, the appeal here is taken from the denial of a motion to reconsider the earlier ruling. The trial court has effectively, unequivocally, and, as we discuss below, erroneously rejected Miss Bradshaw's request for assistance.

2. *Separability*

The second criterion under *Cohen* requires that the court examine the relation between the substance of

the order and the merits of the action itself. In *Cohen* the Court characterized the order as "separable from, and collateral to" the merits. The Court stated that the separability requirement would be satisfied where the order was "*too independent* of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546, 69 S.Ct. at 1226 (emphasis added). The Court said the collateral order exception would not apply to decisions that are "steps" towards final judgment on the merits. One might well simply conclude from the above, as did the Fifth Circuit in *Caston*: "Obviously, the refusal to appoint an attorney is collateral to the merits of the case." 556 F.2d at 1308.

3. *Effective Review*

The last criterion in assessing appealability under *Cohen* is whether the rights asserted can be adequately protected on appeal from the final judgment. We are unwilling to engage in two untenable assumptions we would be required to make in order to find that "effective review" is available after final judgment on the merits. The first is that civil rights plaintiffs are capable of prosecuting their own cases through al; the second is that should they somehow succeed in doing so, they will have the determination and capability to perfect and conduct appeals properly and fully after they lose. Both assumptions overlook the congressional judgment to the contrary that led to the enactment of section 2000e-5(f)(1)(B).

Bradshaw v. *Zoological Society of San Diego*, 662 F.2d 1301, 1306, 1307, 1310 (9th Cir. 1981).

The *Bradshaw* majority opinion, from which I have quoted brief answers to the three *Cohen* tests, of course, had much more to say on each topic. The full debate between Judge Reinhardt and Judge Wallace is readily available. Judge Reinhardt's opinion is better reasoned, is directly applicable to our cases and should be followed.

The same may be said generally in comparing the four Courts of Appeals' opinions holding that denied motions to appoint in the instant type of cases are appealable, to the three opinions which follow which took a contrary point of view. *See Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983); *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981); and *Cotner* v. *Mason*, 657 F.2d 1390 (10th Cir. 1981).

It may be significant that none of the three cases referred to immediately above was filed under Title VII. It is also significant that the four Circuit Courts of Appeals cited earlier have all allowed appeals based on Title VII.

IV. Sixth Circuit Cases

In *General Electric Co.* v. *Valeron*, 608 F.2d 265 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980), with Judge Brown writing for a panel of the Sixth Circuit, which included the author of this opinion, the court took jurisdiction of an order disqualifying appellant's chosen counsel, affirming the disqualification. We there upheld General Electric's claim that Valeron's counsel had a conflict of interest from earlier legal work for General Electric. There would seem to be much more reason for considering our current cases to be immediately appealable than in the General Electric appeal.

This same comment may be made in relation to this court's opinions in *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82 (6th Cir. 1976) and *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979). *See also Koller* v. *Richardson-Merrell, Inc.*, No. 84-5039 (D.C. Cir. May 29, 1984); *Interco Systems Inc.* v. *Omni Corporate Services*, Nos. 84-7008, 84-7012, (2d Cir. Apr. 30, 1984).

In *United States* v. *Caggiano*, 600 F.2d 184 (6th Cir. 1981), this court summarized the rule in civil cases:

> The weight of authority is that in civil cases an

order granting a motion to disqualify is immediately appealable as a final order under § 1291 while an order denying a motion to disqualify is not appealable under § 1291. *General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979), *cert. denied*, 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980), and *Armstrong* v. *McAlpin*, 625 F.2d 433, 440-441 (2nd Cir. 1980) (en banc) *vacated on other grounds*, 449 U.S. 1106, 101 S. Ct. 911, 66 L.Ed.2d 835 (1981), holds that orders granting disqualification are appealable and *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 896, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), holds that orders denying such motions are not appealable under § 1291. See cases collected in United States Code Service 28 U.S.C. § 1291 Note 72, entitled Disqualification of Counsel and Note 72 in its May 1981 Cumulative Supplement.

No Sixth Circuit precedent is directly applicable to this appeal. But the cases cited and discussed above generally have treated the disqualification of a party's retained counsel in a civil action as appealable. If disqualification of counsel of a party's *choice* is "final" for purposes of appealability, it is clear that denial of any counsel at all to a party unable to afford one is all the more "final" for purposes of 28 U.S.C. § 1291.

In summary, there is really only one actually debatable issue, namely Finality. It is obvious that the denial of a motion for counsel is completely separate and distinct from the merits of a civil rights complaint concerning employment discrimination. It is equally obvious that absent appointment of counsel by this appellate court, there could have been no effective review. This appeal was briefed and argued on behalf of the four complainants below by counsel appointed by this court.[2]

[2] John Gleeson, now of the firm of Cravath, Swaine and Moore of New York City, argued these appeals. He was formerly a law clerk for a judge of the Sixth Circuit. Under instruction of a panel of this court, the Clerk's office, faced by four utterly inadequate attempts at pro se appeals and instruction from a panel of this court to appoint

I return now to Finality, the only issue upon which there is really any logical debate – if indeed it can be found there. It can, of course, with at least surface logic, be argued that denial of counsel is not "final" because an impoverished litigant can proceed in forma pauperis to try the case himself. Indeed some such efforts may from time to time have succeeded – albeit rarely.

There are few legal issues which come before the federal courts which offer more complexity than the often critical, shifting standards of proof in employment discrimination cases. *See, e.g., United States Postal Service Board of Governors* v. *Aikens*, 103 S. Ct. 1478 (1983); *Burdine* v. *Texas Department of Community Affairs*, 450 U.S. 248 (1981). When the basic assertion of a plaintiff is that he or she was discharged because of race, a plaintiff without legal training or advice could hardly be expected to know that an outburst of racially derogatory language from a company employment manager concerning another employee in a different department might well serve to convince the trier of fact that the company's reasons for discharge were "pretextual." Would the same in pro per plaintiff, if such legal knowledge did somehow come to him or her, also be able to take the witness' deposition and subpoena that witness so as to protect against employer pressure toward silence or prevarication? Affirmative answers to these questions approach fantasy.[3]

We hold that the court has jurisdiction to hear all four appeals.

appellate counsel, asked him to file an appellate brief. With permission of the Cravath firm (which also assigned Paul C. Saunders, a member of the firm to the case), he agreed. If in place of pro bono work the usual billing practice of Cravath, Swaine and Moore to a corporate client had been followed, I would surmise that an appropriate billing based on legal hours spent and costs would probably have exceeded the yearly salary of a Justice of the Supreme Court.

[3] I recognize that this paragraph is not fully applicable to the *Gordon* v. *Wilson* case which is based on claims of violations of 42 U.S.C. § 1983.

V. Abuse of Discretion

We turn now to a brief analysis of each of the present appeals as to which it is contended that the District Court involved abused judicial discretion in denying appointed counsel.

As to *Henry* v. *City of Detroit*, we find no such abuse, since the District Judge already made good faith efforts to comply with the congressional purpose of providing counsel. The record in *Henry* indicates that two (possibly three) designations of counsel were made. There is no requirement that the District Judge, in seeking a lawyer to prosecute a civil rights claim on behalf of a person unable to pay, must either satisfy the desire (or whim) of the complainant in relation to such potentially charitable representation or order a lawyer to file a case which his investigation indicates is frivolous. The judgment of the district court is affirmed.

In *Cox* v. *Union Carbide*, appellant Cox paid the filing fee and hired a lawyer to file his complaint asserting discriminatory discharge. When Union Carbide sought to take depositions, Cox moved the Court for a stay of depositions and the appointment of counsel. Cox has conceded that he has title to a house and a car and by the time he brought his lawsuit, he had found new employment. We find abuse of discretion in the District Court's failure to conduct a hearing on Cox's financial ability to retain counsel. This Court has held that proof of indigency is not required as a prerequisite for appointment of counsel. *See Harris* v. *Walgreen's Distribution Center*, 456 F.2d 588 (6th Cir. 1972). The case is remanded for a determination of Cox's financial ability to pay for counsel.

In the third Title VII appeal which we review (*Parrish* v. *Marsh*), appellant charges the U.S. Army with racial abuse and discrimination which occasioned his being placed on medical leave. He specifically charges that his supervisor called him "a little black son of a bitch." The District Judge, after a hearing

where he concluded that Parrish had diligently attempted to procure counsel but appointed none, reached the merits of the Army's failure to exhaust administrative remedies defense and dismissed the complaint. While we can make no judgment as to the validity of the Army's defense on the present record, we do conclude that legal counsel is required for meeting such an issue and we reverse and remand for appointment of counsel.

The fourth of these cases, dismissed without counsel, *Gordon* v. *Wilson, et al.*, is a prisoner complaint alleging inadequate examinations and medical treatment. The District Judge referred the complaint to a Magistrate for pretrial proceedings. During these, appellant requested the appointment of a fellow inmate as lay counsel. The Magistrate, indicating familiarity with the work of the fellow prisoner, denied the motion whereupon Gordon brought this appeal. There is no indication in this record that the District Judge ever reviewed the Magistrate's order or plaintiff's alternative request for appointment of a specific Lexington attorney. This appeal should therefore be remanded to the District Court for further proceedings in accord with 28 U.S.C. § 636(b)(1) and *Hill* v. *Duriron Company, Inc.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

BROWN, Senior Circuit Judge, dissenting. The majority's opinion substantially erodes the rule restricting appellate review to the final decisions of a district court. By an unfortunate expansion of the exception for so-called "collateral orders," the majority's decision will invite numerous -- if not automatic -- appeals of decisions frequently made on incomplete and developing records. Because the majority's decision is contrary to the policy against piecemeal review and contravenes the Supreme Court's most recent delineations of exceptions to that policy, I must respectfully dissent.

Although the rule restricting federal appellate review to final decisions is grounded on the statutory jurisdiction of the courts of appeals, 28 U.S.C. § 1291, the justification for the restriction emanates from the organization of the judicial system. The rule prevents the drain on the resources of the litigants and the judicial system that would result from the separate appeals of various rulings made during the course of a district court proceeding. The requirement of finality ensures the integrity of the trial process and the orderly and efficient review of claims on appeal. Finality "is not a technical concept of temporal or physical termination. It is the means for obtaining a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940).[1]

So strong is the policy undergirding the rule, that this court may accept for review only the "limited category of cases falling within the 'collateral order exception' of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949)."

[1] The Supreme Court (per Marshall, J.) recently described how the final judgment rule protects the integrity of the district court.

> [The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368, 374 (1981).

United States v. *Hollywood Motor Car Co.*, 548 U.S. 263, 265 (1982). The exception must be strictly applied lest the court, in sympathetic response to particular circumstances, open the door to a host of cases that would vitiate the rule.[2]

A decision falls within the exception if and only if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). These factors must be carefully applied in light of precedent and the purposes served by the final judgment rule. The majority's opinion, I believe, fails in these respects.

In *Cohen*, the Court held that only decisions conclusively disposing of an issue could be appealed. "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." 337 U.S. at 546. At issue in that case was a district court's ruling in a stockholder's derivative suit denying a corporate defendant's demand that the plaintiff post a bond. The demand was made pursuant to a state statute making a plaintiff holding a small amount of stock liable for the fees and expenses of a successful defendant. The Court noted that the lower court's ruling finally disposed

[2] In the face of increasing demands to expand the exception, appeals courts have underscored the importance of strictly applying the *Cohen* exception.

> This court has repeatedly stressed the extraordinarily limited nature of the 'collateral order' doctrine . . . We must therefore be parsimonious in our analysis of appealability and not grant an exception . . . unless . . . all three requirements of *Cohen* are met."

In re Corrugated Container Antitrust Litigation, 694 F.2d 1041, 1042-43 (5th Cir. 1983). *See also U.S. Tour Operators Ass'n* v. *Trans World Airlines*, 556 F.2d 126, 128 (2d Cir. 1977) ("The reasons for the final judgment rule, . . . and our reluctance to depart from it hardly need explanation again, particularly at a time of swollen appellate dockets."); *Cullen* v. *New York State Civil Service Comm'n*, 566 F.2d 846, 848 (2d Cir. 1977); *Weit* v. *Continental Illinois Nat. Bank & Trust Co.*, 535 F.2d 1010, 1014 (7th Cir. 1976).

of a serious and unsettled matter. The Court contrasted this order with a determination fixing the amount of the bond, a discretionary matter that the statute made subject to reconsideration from time to time. Such an order, the Court implied, would be considered inconclusive because of the procedural opportunity for reconsideration. Thus, in *Coopers & Lybrand* v. *Livesay*, the Court found an order denying class certification "inherently tentative" because such an order was subject to revision before a decision on the merits under Fed. R. Civ. P. 23(c)(1). 437 U.S. at 469 n.11. Although a statute or rule providing for revision of an order may deprive it of finality, other aspects of a decision may also render an order inconclusive. An indication by the court that the order is conditional or otherwise tentative will deny finality to an order. *See Gerstle* v. *Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972).[3]

Although there is no special provision for the reconsideration of a refusal to appoint counsel under the statutes now in issue, the very nature of the question suggests that the determination should not be deemed conclusive for purposes of appeal.[4] As the facts of the case unfold indicating that the cause may have merit and the proceedings enter a stage where *pro se* representation becomes obviously impractical and assistance is necessary, a district court may properly entertain a new motion for

[3] I suspect that the majority's decision will cause district courts, if inclined to deny motions for appointment, to take such motions under advisement or make denials expressly conditional pending further development of the case.

[4] In *Maclin* v. *Freake*, 650 F.2d 885 (7th Cir. 1981), the Seventh Circuit stressed the wide discretion exercised by the district court regarding a request for appointed counsel. The "denial of counsel will not be overturned unless it would result in fundamental unfairness impinging on due process rights." *Id.* at 886. The court lists several factors that should guide such a decision including the merits of the claim, the ability of the litigant to investigate and present the case, and the complexity of the issues presented.

appointment of counsel.[5] Because the factual basis for a decision involving the appointment of counsel is necessarily evolving and multifarious, an initial denial is inherently inconclusive. In this respect, the decision is similar to the alteration of a bond to secure a defendant during the course of a trial. As discussed in *Cohen*, because such a determination is intertwined in varying considerations central to the management of a lawsuit, appeal would constitute improper intervention.

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the Supreme Court held that orders denying motions to disqualify counsel were not appealable under § 1291 prior to final judgment. The Court noted that such orders were necessarily subject to developments at trial.

> The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

Id. at 377. This reasoning is applicable to the instant cases. A motion for appointment of counsel is typically made immediately after a complaint is filed. A fair evaluation of the merits of the case must usually await a pre-trial conference and some form of discovery. A rational allocation of judicial resources suggests that appellate consideration await the final disposition of the suit.

[5] It should be recognized that the trial of a case without benefit of counsel for plaintiff imposes an extra burden on the trial judge. Thus, the judge has a real incentive to appoint counsel before trial.

The requirement under *Cohen* that the order resolve an issue completely separate from the merits is not satisfied if the decision involves considerations "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 469, *quoting from, Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). This requirement promotes judicial economy and protects orderly procedure at trial by prohibiting appellate intervention where the decision constitutes a stage in the final disposition of the substance of the litigation. As noted above, the determinations in the instant cases turn in part on the courts' evaluation of the merits. Although the determination does not dispose of an element in the claim, appeal of the question would disrupt the orderly development of the case.

The third requirement of the *Cohen* test – whether the order is effectively unreviewable on appeal from a final judgment – principally accounts for the serious division of authority on this issue among the circuits.[6] The majority, echoing the reasoning in *Bradshaw* v. *Zoological Society*, 662 F.2d 1301, 1310-14 (9th Cir. 1981), maintains that this requirement is satisfied by the likely inability of a *pro se* plaintiff to continue a suit through trial and perfect an appeal. The majority finds that a plaintiff facing such barriers would abandon the suit before final judgment. These practical considerations, the majority concludes, render the denial of appointment of counsel effectively unreviewable on appeal from a final judgment.

The practical consequence of an interlocutory order that might force a plaintiff to abandon a lawsuit gave rise to the

[6] *Compare Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064, 1065 (7th Cir. 1981) ("The refusal of the district court to appoint counsel, while it may make proceeding more difficult, does not end the litigation on the merits. The *pro se* litigant remains free to present his claim to the court on his own.") *with Bradshaw* v. *Zoological Society*, 662 F.2d 1301, 1313 (9th Cir. 1981) ("Civil rights litigants are presumptively incapable of handling complex litigation themselves and of protecting themselves against the serious prejudice that occurs at trials in which their adversaries are represented by the most sophisticated law firms.")

so-called "death knell" doctrine. The doctrine was used to review denials of class certifications where appeals courts assumed or found that the plaintiff would find it economically imprudent or impossible to pursue claims without the possibility of a class recovery. The Supreme Court, in *Coopers & Lybrand* v. *Livesay*, rejected this approach. The Court held that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." 437 U.S. at 477.

The majority attempts to distinguish *Coopers & Lybrand* v. *Livesay* on the grounds that even after denial of class certification, counsel would remain to pursue the plaintiff's claims. This distinction, however, misses the entire thrust of the Court's decision. The death knell doctrine was predicated on the assumption that a plaintiff would be unable to bear the expense of going forward with a trial without the incentive of an award to the alleged class. Therefore, the putative class representative for whom the "death knell" sounds, is in the same practical position as that which the majority ascribes to the civil rights litigant who is denied appointed counsel. Thus, *Coopers & Lybrand* squarely rejects the majority's view that an order is appealable because it presents the plaintiff with such practical difficulties as to cause the plaintiff to abandon the suit.

The majority's construction of the requirement that an order be effectively unreviewable should be contrasted with decisions properly finding that an order satisfies this element of the *Cohen* exception. For example, a dismissal of one of several claims is appealable where the dismissal is a predicate for a remand to state court. Denying finality to the order would eliminate appellate review. *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). Similarly, where the right asserted would be irremediably lost if trial continued, then the requirement is satisfied. Thus, an order requiring disclosure of plaintiffs' identities in a sex discrimination case was final for

purposes of appeal. *Southern Methodist Univ. Ass'n of Women Law Students* v. *Wynne & Jaffe*, 599 F.2d 707, 711-12 (5th Cir. 1979). Appeals have also been permitted when a criminal defendant claims that he will be subjected to double jeopardy, *Abney* v. *United States*, 431 U.S. 651 (1977), or a violation of his constitutional right to bail, *Stack* v. *Boyle*, 342 U.S. 1 (1951). Certain orders denying or removing a form of security for a party to litigation are also not subject to effective review following final judgment. Once the trial proceeds without the security, the right is lost and the party seeking the security may have no remedy on appeal or in a new trial. *See Cohen*, (permitting appeal of a denial of a bond to secure defendant's costs); *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (permitting appeal of an order vacating an attachment).

The majority relies primarily on its view that a civil rights litigant will abandon a suit following an order denying appointment of counsel and that this abandonment will constitute irreparable injury. As discussed above, I believe that this approach is foreclosed by *Coopers & Lybrand*. The Ninth Circuit in *Bradshaw* v. *Zoological Society*, however, notes additional considerations. There, the court asserts that a litigant could make certain errors at trial which might prejudice the litigant in a new proceeding. For example, a litigant could be bound by or impeached by earlier testimony or could suffer from prior stipulations. 662 F.2d at 1311 - 14. Similar claims of possible prejudice in the conduct of trial, however, were rejected in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981). There, the party seeking immediate review maintained that proceeding to trial following a denial of a motion to disqualify counsel could compromise subsequent proceedings. Such a possibility, the Court held, did not show that the asserted right would be irremediably lost if appeal was postponed until final judgment. The Court noted that similar prejudice often results from erroneous interlocutory decisions. Yet the possibility of such prejudice was not sufficient to support a

general exception to the rule limiting appeals to final judgments. 449 U.S. at 378.

The potential for irreparable harm in the conduct of a civil rights trial by a *pro se* litigant was considered in *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983). The court, relying on *Risjord*, found that the possibility of harm – although perhaps greater from the denial of appointed counsel than from other orders – did not overcome "the strong statutory policies against piecemeal review." The court noted that where a reviewing court found that the order denying appointment of counsel was erroneous, it could relieve the litigant of "any untoward consequences of his lack of counsel." *Id.* at 147 n. 3.

The appellants in the cases at bar contend that review following final judgment would be ineffective because of the difficulty of showing prejudice.[7] The First Circuit responded to this argument in *Appleby* by holding that an erroneous order denying appointed counsel would be presumed prejudicial. 696 F.2d at 147. A similar analysis was employed by the Supreme Court in the recent decision of *Flanagan* v. *United States*, — *U.S.* —, 104 S.Ct. 1051 (1984). There, the Court held that an order disqualifying counsel in a criminal trial was not immediately appealable. The Court, without deciding whether actual prejudice was required to reverse a district court's disqualification of counsel, held that if prejudice is presumed, post-conviction review is fully effective. Therefore, the Court concluded, the final element of *Cohen* is not satisfied. On the other hand, if a showing of prejudice is required, the Court found that such an order was not "truly collateral" because the issue decided is not completely separate from the merits, and thus the order would not meet the second condition of *Cohen*. 104 S.Ct. at 1056-57.

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[7] In *Bradshaw* v. *Zoological Society*, the Ninth Circuit avoided reaching the question of the standard of review of a denial of appointed counsel following final judgment. The court did note that if a showing of prejudice was required, effective review would be even more improbable, particularly where a partially successful plaintiff challenges the remedy. 662 F.2d at 1311 n. 23.

Although the majority correctly recognizes that *Flanagan* was a criminal case and that in such cases there is an especially strong presumption against piecemeal appeals, the decision nevertheless is relevant to the issue before this court. Despite the constitutional implications of a decision denying a criminal defendant counsel of choice, the Court in *Flanagan* held that such a decision did not merit immediate appeal. By contrast, Congress enacted the provisions for appointment of counsel in the cases at bar. These provisions, which vest the decision in the sound discretion of the trial court, are surely less support for a demand for immediate review than the constitutional grounds which were considered and found insufficient in *Flanagan*.[8]

The Court's decision in *Flanagan* regarding the balance of factors should also guide this court's consideration of the costs of immediate appeal from orders denying appointment of counsel in civil rights cases. Although interruption of a criminal trial exacts a "presumptively prohibitive price," 104 S.Ct. at 1057, equally heavy costs will be imposed on the judicial system by expanding the exception for collateral orders on the grounds offered by the majority. The majority stresses that these costs are overcome by the public policy evinced by the statutory provisions for appointment of counsel. This argument, however, can be made for a number of various

[8] It is especially important that an appellate court refrain from creating a general exception to review orders founded on the exercise of discretion by a district court. Judge Friendly has written:

> Whether a court has power to require an undertaking is an issue of law, and an appellate decision will settle the matter not simply for the case in hand but for many others — as was notably true with the important issue in *Cohen*. In contrast, where the question is the propriety of an exercise of discretion in denying security, the factual variations are so numerous that a judgment on appeal can do little to establish meaningful standards. Furthermore, since review would be limited to 'abuse' of discretion, the likelihood of reversal is too negligible to justify the delay and expense incident to an appeal and the consequent burden on hardpressed appellate courts.

Donlan Industries, Inc. v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968).

interests affected by interlocutory orders. Acceptance of this criteria would transform the exception for collateral orders into a "license for broad disregard of the finality rule imposed by Congress in § 1291." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 378. Accordingly, the Supreme Court rejected this contention in *Coopers & Lybrand* v. *Livesay* where the appellants maintained that the "vital public interest" served by class actions merited special rules of appealability. The Court concluded that such policy arguments, "though proper for legislative consideration, are irrelevant to the issue we must decide." 437 U.S. at 470. Unfortunately, the majority ignores this admonition.

Congress, it should be noted, has provided civil rights litigants with an important means to overcome the barriers described by the majority. The attorney's fees provision, 42 U.S.C. § 1988, insures that meritorious claims will not go unrepresented because of the plaintiff's inadequate financial resources. The existence and widespread use of this provision weakens the majority's assertion that immediate review is necessary to protect civil rights litigants. The majority's attempt to provide this protection, moreover, could easily escape the area of civil rights litigation. The majority's decision rests in part on 28 U.S.C. § 1915(d), the general provision for appointment of counsel in civil actions. By extension of the majority's reasoning, any civil litigant could obtain immediate review of an order denying appointment of counsel by arguing the importance of the right at stake and the complexity of the issues in the case.

The majority also fails to acknowledge the practical consequences of its decision. Because an order denying appointment of counsel is necessarily contingent on events at trial, there is a possibility of repeated appeals in a single case. Any particular order may be remanded for the development of an adequate record, causing further interruption in the trial proceedings. *See Coopers & Lybrand* v. *Livesay*, 437 U.S. at 474. A litigant, moreover, may feel compelled to seek immediate

review because of the fear that a failure to do so would foreclose review of the order on final judgment.[9] This will only add to the delay and disruption wrought by the majority's decision.

The greatest fault in the majority's decision is its disregard of the clear policy and directions established by the Supreme Court in recent opinions on the issue of appealability. In *Coopers & Lybrand* v. *Livesay* the Court squarely rejected the majority's principal argument that immediate appealability can be supported by the possibility that an appellant may abandon the case. The Court in that case and again in *Firestone Tire & Rubber Co.* v. *Risjord* stressed the extremely limited nature of the exception for collateral orders. In the latter case, the Court observed that where manifest injustice would result from reserving appeal until final judgment, the party could seek certification for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b) or a writ of mandamus. These remedies, which were designed to meet exceptional circumstances, were suggested by the Court as preferable to creating a general exception for an entire class of interlocutory orders. 449 U.S. at 378 n. 13. The majority has simply failed to supply cogent reasons grounded in precedent for its departure from the Court's direction.

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[9] In *Durkin* v. *Mason & Dixon Lines*, 202 F.2d 425 (6th Cir. 1953), this court held that appellants should have taken an appeal from an order denying liability even though there was no final judgment in the case. This holding was criticized in 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3910 (1976). *But see Citibank* v. *Data Lease Fin. Corp.*, 645 F.2d 333 (5th Cir. 1981) (holding that the failure to appeal from a sale order in a forfeiture proceeding foreclosed a later challenge on a final appeal).

APPENDIX B

OPINION OF THE COURT OF APPEALS

ON REHEARING *EN BANC*,

MAY 22, 1985

Nos. 81-1767, 81-5827, 81-5878, 82-5009

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

May 22, 1985

ARTELL M. HENRY (81-1767),
Plaintiff-Appellant,

v.

CITY OF DETROIT MANPOWER DEPARTMENT,
Defendant-Appellee.

ON APPEAL from the United States District for the Eastern District of Michigan.

DOUGLAS L. GORDON (81-5827),
Plaintiff-Appellant,

v.

GEORGE WILSON, AL PARKE, DR. HODGE,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky.

NORMAN E. COX (81-5878),
Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

RONNY LEE PARRISH (82-5009),
Plaintiff-Appellant,

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Before: LIVELY, Chief Judge; EDWARDS,* ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, WELLFORD and MILBURN, Circuit Judges; and BROWN, Senior Circuit Judge.

BROWN, S.J., delivered the opinion of the Court, in which LIVELY, C.J., ENGEL, MERRITT, KENNEDY, MARTIN, WELLFORD and MILBURN, JJ., joined with MERRITT, J., (p. 15) also delivering a separate concurring opinion. CONTIE, J., (p. 16) delivered a separate concurring opinion. KRUPANSKY, J., (pp. 17-31) delivered a separate dissenting opinion, in which EDWARDS*, J., KEITH and JONES, JJ., joined, with JONES, J., (p. 32) also delivering a separate dissenting opinion, in which EDWARDS*, J., joined.

BAILEY BROWN, Senior Circuit Judge. The court having voted to consider and having considered this cause *en banc*, the prior opinion and decision of this court reported at 739 F.2d 1109 (6th Cir. 1984) is vacated.

These four appeals present a common threshold issue, never before decided by this court, whether the orders of

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* Honorable George Edwards took senior status January 15, 1985.

the district courts from which the appeals were taken were "final decisions" within the meaning of 28 U.S.C. § 1291 and, therefore, are appealable as a matter of right.[1] These pretrial orders denied plaintiffs' motions for appointment of counsel in three actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[2] and in one action brought under 42 U.S.C. § 1983.[3]

We determine that these orders denying the motions for appointment of counsel are not, prior to final disposition of the case in the district court, "final decisions" under section 1291. Therefore we dismiss these appeals.[4]

In *Henry* v. *City of Detroit Manpower Department*, after filing a charge with the Equal Employment Opportunity

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[1] 28 U.S.C. § 1291 provides in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

[2] For actions brought under Title VII, 42 U.S.C. § 2000e-5(f)(1)(B) provides in relevant part that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant. . . ."

[3] 28 U.S.C. § 1915, in addition to authorizing the commencement of any civil action without prepayment of fees and costs upon making an affidavit that plaintiff is unable to pay costs or give security, further provides in relevant part in subsection (d): "[t]he court may request an attorney to represent any such person unable to employ counsel. . . ."

[4] Five circuits have held that such orders are not immediately appealable: *Smith-Bey* v. *Petsock*, 741 F.2d 22 (3d Cir. 1984); *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983); *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981), *overruling Jones* v. *WFYR Radio/RKO General*, 626 F.2d 576 (7th Cir. 1980); *Cotner* v. *Mason*, 657 F.2d 1390 (10th Cir. 1981); *Miller* v. *Pleasure*, 425 F.2d 1205 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970), *overruling Miller* v. *Pleasure*, 296 F.2d 283 (2d Cir. 1961), *cert. denied*, 370 U.S. 964 (1962). Four circuits have held such orders are immediately appealable: *Slaughter* v. *City of Maplewood*, 731 F.2d 587 (8th Cir. 1984); *Brooks* v. *Central Bank of Birmingham*, 717 F.2d 1340 (11th Cir. 1983); *Bradshaw* v. *Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981); *Hudak* v. *Curators of the University of Missouri*, 586 F.2d 105 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979); *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977).

Commission (EEOC) complaining that he had been discriminated against in his employment because of his Jamaican origin and after receiving a right-to-sue letter, Henry filed a complaint under Title VII in the district court for the Eastern District of Michigan. He further sought appointment of counsel, which was denied, and Henry then brought this appeal.

In *Cox* v. *Union Carbide Corp.*, after filing charges with the EEOC alleging that he had suffered discrimination in his employment because of his race and after receiving his right-to-sue letter, Cox filed a complaint pursuant to Title VII in the district court for the Eastern District of Tennessee and sought appointment of counsel. The motion for appointment of counsel was denied, and Cox then brought this appeal.

In *Parrish* v. *Marsh*, Parrish, a civilian employee of the Army, brought a Title VII action in the district court for the Western District of Kentucky, alleging that he had been discriminated against in his employment because of his race and that he had satisfied all of the requirements for bringing an action pursuant to 42 U.S.C. § 2000(e)-16. Parrish sought appointment of counsel, the district court denied the application, and Parrish brought this appeal.

In *Gordon* v. *Wilson*, Gordon, an inmate in a Kentucky penal institution, brought an action for damages in the district court for the Western District of Kentucky under 42 U.S.C. § 1983 against the warden and others. He alleged denial of a constitutional right to adequate medical treatment. Upon being denied his application for appointment of counsel, he brought this appeal.

Preliminarily, we set out the positions that are common to the appellants[5] and appellees. First, the issue as to the appeal-

[5] Appellants were ably represented on appeal by court appointed counsel John Gleeson, of the firm of Cravath, Swaine and Moore of New York City. Mr. Gleeson was formerly a law clerk for a judge of this court.

ability of these orders denying appointment of counsel is the same whether appointment was sought pursuant to 42 U.S.C. § 2000e-5(f)(1)(B) or pursuant to 28 U.S.C. § 1915 (d).[6] Second, the district courts, in considering an application for appointment of counsel, should at least consider plaintiff's financial resources, the efforts of plaintiff to obtain counsel, and whether plaintiff's claim appears to have any merit. Third, upon a review of a district court's denial of a motion for appointment of counsel, the standard to be applied is whether the trial court abused its discretion. We agree with these positions.

In contending that orders denying motions for appointment of counsel are "final decisions" under section 1291, appellants recognize that: "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Appellants, however, contend that the orders involved here fit into the "collateral order" exception to the usual finality requirement as this exception was recognized by *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). In *Cohen*, the question was whether a decision denying a motion to require a plaintiff to post bond in a stockholder's derivative action was a final decision. The Court stated:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546.

[6] This was expressly held in *Slaughter* v. *City of Maplewood*, 731 F.2d 587, 589 (8th Cir. 1984).

In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), the Supreme Court was more specific in setting out the requirements of the "collateral order" exception recognized in *Cohen*. In holding that an order denying certification of a class under Fed. R. Civ. P. 23, is not a final decision under section 1291, the Court stated:

> To come within the "small class" of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Id. at 468 (footnote and citations omitted).

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the Court unanimously held that an order denying a motion to disqualify counsel of the opposing party in a civil case was not a final decision within the meaning of section 1291. In so doing, the Court explained the reasons for ordinarily requiring a final disposition of the case before appeal:

> This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

Id. at 374 (Marshall, J.) (citations omitted). The Court, applying the formulation as expressed in *Coopers & Lybrand* for determining whether the order was a "collateral order" for purposes of appeal, concluded that it was not collateral and ruled that the order was effectively reviewable on appeal.

Thus *Cohen*, *Coopers & Lybrand* and *Firestone* hold that an order is not a "collateral order" that satisfies the "final decision" requirement of section 1291 unless: (a) it conclusively determines the disputed question; (b) it resolves an important question completely separate from the merits of the action; and (c) it cannot effectively be reviewed on appeal from a final judgment.

The most recent decision of the Supreme Court on the issue of the appealability of interlocutory orders is *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984). In *Flanagan*, the question was whether an order disqualifying defendants' counsel in a criminal case was appealable under section 1291, and the Court unanimously held that it was not. The Court did not decide in *Flanagan* whether an erroneous order disqualifying counsel should, on appeal, be presumed prejudical. The Court then reasoned that if an erroneous order disqualifying counsel is presumed prejudicial, it may be effectively reviewed; if, on the other hand, an erroneous order is not presumed prejudicial, then review of the disqualifying order cannot be done without consideration of the merits of the case. Thus, the Court reached the conclusion that the order disqualifying defendants' counsel was not an immediately appealable collateral order because the order failed to satisfy either the requirement that the issue on appeal be completely separate from the merits or the requirement that the order not be susceptible to effective review.

We will not lengthen this opinion by quoting in more detail the philosophical and practical reasons set out in *Coopers & Lybrand*, *Firestone* and *Flanagan* for giving a narrow application to *Cohen's* collateral order exception to the "final decision" requirement to section 1291. These are generally

familiar and need not be repeated. Instead, we will proceed to apply the three tests, established by these decisions, that must be satisfied before these orders denying appointment of counsel can be held immediately appealable.

I.

The first requirement of immediate appealability is that the order denying appointment conclusively determine the disputed question. Appellants argue that orders are "final," and therefore conclusively determine a matter, if further action is not contemplated, and the fact that the district judge has the power to change the order does not prevent it from being final. Supp. Brief for Appellants at 13 (citing 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3911 (1976)). They further argue that orders are "final" unless they are made tentative by statute or rule or unless the orders are by their terms made tentative. Thus, as is the case here, in the absence of a statute, rule or express reservation making the order tentative, appellants would have us presume, for appealability purposes, that further action was not contemplated and that the order was final. We agree that, if further action by the district court is not contemplated, then for present purposes the order may be considered final. We believe, however, that orders denying appointment of counsel should be presumed tentative because these motions are sometimes made before filing of a complaint, *see, e.g., Harris* v. *Walgreen's Distribution Center*, 456 F.2d 588 (6th Cir. 1972), and more frequently are made with the filing of a *pro se* complaint and with little or no showing of plaintiff's efforts to obtain counsel, or of plaintiff's financial ability to retain counsel. Also, there is very little in the record upon which the district judge can, for this purpose, determine whether the claim has merit. We believe that a practical approach to this issue of appealability, as the Supreme Court directs in *Cohen*, leads to the conclusion that

an order denying appointment of counsel does not conclusively determine the disputed question prior to the district court's final disposition of the case unless the district court's order was expressly made final. 337 U.S. at 546. Accordingly, we determine that orders denying appointment of counsel in these cases cannot, on this appeal, be said to have conclusively determined the disputed question.

II.

We believe *Flanagan* makes clear that the other two requirements for application of the collateral order rule are not satisfied here. These requirements are that the order resolve an important question completely separate from the merits of the action and that the order cannot effectively be reviewed on appeal from a final judgment. We do not, as *Flanagan* did not with respect to an order disqualifying counsel, decide whether an erroneous order denying appointment of counsel should be presumed prejudicial since such is not necessary to our decision here. Further following the rationale of *Flanagan*: if an erroneous order denying appointment of counsel is, upon appeal of a final judgment, presumed prejudicial, then the order is subject to effective review; if, on the other hand, an erroneous order denying appointment of counsel is not presumed prejudicial, then the order cannot be effectively reviewed without consideration of the merits of the case. We recognize that *Flanagan* was a criminal case and that, as the Court therein recognized, the policy against piecemeal appeals is particularly strong in criminal cases. We believe, however, the logic of the Court's opinion equally applies here.

The appellants argue that *Roberts* v. *United States District Court*, 339 U.S. 844 (1950), in which the Court held that an order denying a habeas corpus applicant the right to proceed *in forma pauperis* is appealable under section 1291, is relevant here. But, as the Second Circuit stated in *Miller*

v. *Pleasure*, 425 F.2d 1205 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970), *overruling Miller* v. *Pleasure*, 296 F.2d 283 (2d Cir. 1961), *cert. denied*, 370 U.S. 964 (1962), in which that court held that an order denying appointment of counsel is not immediately appealable:

> [T]he statement in Roberts v. United States District Court upholding the appealability of an order denying leave to proceed *in forma pauperis* is not truly apposite. Such an order closes the door to the courthouse to a plaintiff having a right to enter if he is indigent as he claims; an order declining to request an attorney to represent him simply denies an added facility in the prosecution of his claim which Congress has left to the discretion of the court. The growing burdens on the courts of appeals, with nearly three times as many appeals in 1969 as in 1960, requires [sic] us to look on appeals alleged to come under the "collateral order" doctrine of Cohen v. Beneficial Industrial Loan Corp. with greater care than a decade ago.

425 F.2d 1205, 1205 (2d Cir. 1970) (citations omitted).

III.

It is argued that the legislative history of Title VII, which emphasizes the importance of counsel to represent plaintiffs in these often complicated cases, somehow supports the contention that orders denying appointment of counsel are immediately appealable. We believe the answer to this argument is that, if Congress had intended to make these orders immediately appealable, it would have done so. We believe the more reasonable interpretation of this legislative history is that Congress, by providing for appointment of counsel, 42 U.S.C. § 2000e-(5)(f)(1)(B), and for recovery of attorney's fees by the prevailing party, 42 U.S.C. § 2000e-5(k),

in Title VII cases, considered that it had done enough to insure that claimants with meritorious cases would have counsel. It should also be remembered that 28 U.S.C. § 1915(d), the provision for appointment of counsel in cases brought under 42 U.S.C. § 1983, does not have that legislative history; yet it is conceded that the question of appealability is the same whether counsel is sought under Title VII or under 28 U.S.C. § 1915(d). Last, while the availability of appropriate counsel for appointment may vary greatly from district to district, it is well known that the district court's burden is lightened by the presence of appointed counsel so the district court has a real incentive, for this reason alone, to appoint counsel.

It is also argued that actions brought under Title VII and actions brought under 42 U.S.C. § 1983, being civil rights actions, are so important that an exception should be made for them and that orders denying appointment of counsel in such cases should be deemed immediately appealable. Appellants, however, advance no reason why non-civil rights actions for which appointment of counsel may be sought under 28 U.S.C. § 1915(d) should, for immediate appealability purposes, be treated as less important than civil rights cases. We do not believe that we should accept appellants' invitation to establish a hierarchy of cases as a basis for immediate appealability of orders denying appointment of counsel. This is a legislative function, *see Coopers & Lybrand*, *infra*.

The Supreme Court, in its unanimous opinion in *Coopers & Lybrand*, not only refused to treat the importance of the case as a basis for allowing immediate appeal of an interlocutory order; it also refused to allow the appeal of the interlocutory order on the ground that, if the order stood, it would be the "death knell" of the case. In *Coopers & Lybrand*, the district court denied class certification under Fed. R. Civ. P. 23, and the plaintiffs appealed this denial. The court of appeals took jurisdiction under section 1291 on the ground

that, if the action was not allowed to proceed as a class action, it would not proceed at all because plaintiffs could not or would not finance the prosecution of the action. The court of appeals then reversed the district court's denial of class action status. Upon granting certiorari, the Supreme Court reversed, holding the court of appeals had no jurisdiction. The Court stated:

> In addressing the question whether the "death knell" doctrine supports mandatory appellate jurisdiction of orders refusing to certify class actions, the parties have devoted a portion of their argument to the desirability of the small-claim class action. Petitioner's opposition to the doctrine is based in part on criticism of the class action as a vexatious kind of litigation. Respondents, on the other hand, argue that the class action serves a vital public interest and, therefore, special rules of appellate review are necessary to ensure that district judges are subject to adequate supervision and control. Such policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide.
>
> There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation. Thus, if the "death knell" doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation — rulings on discovery, on venue, on summary judgment — that may have such tactical economic significance that a defeat is tantamount to a "death knell" for the entire case.
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> Though a refusal to certify a class is inherently interlocutory, it may induce a plaintiff to abandon his individual claim. On the other hand, the litigation will often survive an adverse class determination. What

> effect the economic disincentives created by an interlocutory order may have on the fate of any litigation will depend on a variety of factors.
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> . . . .
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> Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a "final decision" within the meaning of § 1291.

Coopers & Lybrand v. *Livesay*, 437 U.S. 463, 470, 477 (1978) (footnotes omitted).

The immediate appealability of an order denying appointment of counsel could have some untoward consequences for the *pro se* plaintiff. If an interlocutory order denying appointment of counsel were, as a collateral order under the *Cohen* exception, a final decision under section 1291, then it would be final for all purposes. If the order was a separate document under Fed. R. Civ. P. 58 and was entered as provided under Fed. R. Civ. P. 79(a), then the time for filing a notice of such an appeal "as of right" would, under Fed. R. App. P. 4(a)(1), begin to run immediately.[7] Herein would certainly lie a trap for the unwary *pro se* plaintiff. Thus, a decision by this court that orders denying appointment of counsel are final decisions under section 1291 would cause the *pro se* plaintiff to lose his right to appeal or force him to appeal forthwith. The first possibility creates an unnecessary burden on *pro se* plaintiffs. The second possibility, which is that *pro se* plaintiffs aware of their right will immediately appeal the district court's denial of their motion for appointment of counsel, creates an unnecessary burden on the court of appeals. Moreover, these forced appeals to determine if the district court abused its discretion would frequently be

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[7] *Citibank, N.A.* v. *Data Lease Financial Corp.*, 645 F.2d 333, 338 (5th Cir. 1981); *Durkin* v. *Mason & Dixon Lines*, 202 F.2d 425, 425-26 (6th Cir. 1953).

on records that would not reflect the *pro se* plaintiff's best case for obtaining appointment of counsel.

Accordingly, we hold that this court does not have jurisdiction of these appeals, and the appeals are dismissed.

It is so ORDERED.

MERRITT, Circuit Judge, concurring. I concur in the opinion of the Court and in its reasoning, and I disagree with the strongly worded, acidulous dissenting opinion. I see no reason to carve out an exception to rules of appealability for civil rights cases. Such cases are no more or less sacrosanct than numerous other types of federal cases for which a lawyer may be appointed. Whether an error has been made respecting the appointment of counsel in civil rights cases can be corrected just as easily after final judgment as in other cases. There is no reason to distinguish civil rights cases from habeas corpus, social security and criminal cases. Once a final judgment is entered, we can review the actions of the District Court regarding legal counsel, just as we review actions on other motions. The number of cases in the federal Courts of Appeal has risen tenfold in the last 20 years. There is no reason to add piecemeal appeals to our present case load by making interlocutory rulings in civil rights cases immediately appealable.

CONTIE, Circuit Judge, concurring. Although I fully agree with the result reached by the majority and with the bulk of its reasoning, I do not agree with the majority that the district courts in these cases did not conclusively determine the appointment of counsel issue. The majority acknowledges the general principle that even if a district court has jurisdiction to alter a prior ruling, a district court nevertheless conclusively decides an issue so long as no further consideration of the issue is contemplated. *See In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1118 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); 15 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3911 (1976 & Supp. 1984). Since the district court orders in these cases meet this standard, I would hold that the orders conclusively decided the issue in question.

The majority creates a narrow exception to the general rule in situations involving denials of appointed counsel. Instead of presuming that a district court order, which on its face contemplates no further consideration of the appointment of counsel issue, conclusively disposes of that issue, the majority presumes that a district court order denying appointed counsel is tentative unless the district court says otherwise. In my view, creating such an exception is unnecessary because district courts are just as capable of drafting language demonstrating that a denial of appointed counsel is tentative as they are of drafting language indicating that a denial of appointed counsel is conclusive. Since the majority creates an unnecessary exception to the general rule that a district court conclusively decides an issue when the language of its order indicates that no further consideration of that issue is contemplated, I do not concur in Section I of the majority opinion. I join in the result reached by the majority and in the remainder of the majority opinion.

KRUPANSKY, Circuit Judge, dissenting, joined by EDWARDS, KEITH and JONES, Circuit Judges. For the reason that the majority decision pragmatically strips a victim of civil rights violations of effective legal representation, and is unsupported in logic, law, or equity, I must respectfully dissent.

Decisions denying the appointment of legal counsel for victims of civil rights violations at the inception of an action must be immediately appealable if the enabling legislation is to be meaningful and effective.

The majority opinion is plumbed upon the unsupported conclusory hypothesis that dispositions of motions to appoint counsel are "inherently tentative" since trial judges may reconsider their ruling as the *pro se* complainant develops the evidence during trial.[1]

The majority's observation that the decision to deny the appointment of legal counsel for victims of civil rights violations is subject to a trial judge's change of heart or mind is irrefutably correct. It is this very truism which prompted this controversy; had the initial decision to deny legal counsel assumed the classical status of a final disposition the issue of interlocutory review would be non-existent. Because the precedent articulated by *Cohen* subsumes the premise that a trial court may at any time, even after judgment, reconsider its decision, it is reasonable to conclude that the Supreme Court's decision in *Cohen* contemplated a far more subtle evaluation than the simplistic postulation of the majority opinion.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the issue joined was whether a decision denying the defendant's motion to require plaintiff to post bond in a stockholder's derivative action was a

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[1] Only one case has questioned the conclusiveness of an order denying counsel. *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983). In that case, the court, at the conclusion of a two-page opinion disposing of the case on other grounds, gratuitously injected dicta characterizing such orders as inconclusive.

final order. Although the Court stated that trial court decisions which were "tentative", "open, unfinished or inconclusive" were not appealable as of right, 337 U.S. at 546, 69 S.Ct. at 1225-1226, the decision denying defendant's motion requiring the plaintiff to immediately post bond was appealable, because "the District Court's action upon this application was concluded and closed and its decision final *in that sense* before the appeal was taken". *Id.* (emphasis added).

The majority opinion correctly concludes and the parties to this litigation concede that, to prevail, the appellants must qualify the decision to deny appointment of legal counsel to victims of civil rights violations within the pronouncements of *Cohen* as a decision that falls into "that small class which finally determines claims of right separable from and collateral to, rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". In construing the language of 28 U.S.C. § 1291, the *Cohen* court stated that "[t]he court has long given this provision of the statute this [a] practical rather than a technical construction".

The Supreme Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470-477, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) distilled the definitions of the collateral order doctrine initially articulated in *Cohen* when it restated that to qualify as final, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. Accordingly, it is against the criteria defined in *Cohen* that the decisions here in issue must be evaluated. Conspicuously ignoring the criteria against which a "final decision" must be measured, the majority opinion is anchored upon the tenuous hypothecation "that orders denying appointment of counsel should be presumed tentative", because, the majority conjectures, "these motions are sometimes made before filing of a complaint, . . . and more

frequently are made with the filing of a *pro se* complaint". A review of the teachings of *Cohen* and its progeny as applied herein fail to support the majority's presumption because no factor necessary for the decision to appoint counsel requires an insight into the merits of the plaintiff's underlying cause of action beyond those which are available to the court at the time of the request. *Jenkins* v. *Chemical Bank*, 721 F.2d 876, 880 (2d Cir. 1983) ("the district court should exercise its discretion by examining the record at the time of appellant's pre-trial requests for counsel. The question of appointment of an attorney is a preliminary inquiry and should not be based upon the evidence adduced at trial").

Addressing, in the first instance, the criterion of "conclusiveness" of a disputed issue, my attention is directed to the Supreme Court's application of *Cohen* in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), to the denial of a defendant's motion to disqualify an adversary's legal counsel of choice. Therein, the seven-member majority observed that the "conclusiveness" test was satisfied "because the only issue is whether challenged counsel will be permitted to continue his representation". 449 U.S. at 375-76, 101 S.Ct. at 674. Certainly the majority cannot seriously argue that a decision denying appointment of counsel to a civil rights plaintiff is any less conclusive than one denying a motion to disqualify an adversary's counsel of choice.

Proceeding to the determination of the second criterion of *Cohen*, namely, whether the denial of legal counsel to victims of civil rights violations is "separable from, and collateral to, rights asserted in the action", I would apply not the unsupported presumption of the majority but rather the analysis of the *Cohen* doctrine. 337 U.S. at 546, 69 S.Ct. at 1225-1226. The general subject of the litigation underlying this appellate review is the alleged violation of civil rights, i.e., employment discrimination because of race in two instances, employment discrimination because of national origin in one instance and, lastly, a prisoner's civil rights

action. It is conceded by the parties and the majority opinion recognizes that the appointment of legal counsel for victims of civil rights violations is a preliminary matter necessitating the trial court's inquiry into the plaintiff's financial resources, his efforts to obtain legal counsel, and the facial merits of the plaintiff's cause of action.

Patently, the Court's inquiry into the plaintiff's financial resources and his efforts to obtain legal counsel are inquiries that may be considered independently from the merits of the controversy without becoming "enmeshed". The majority does not contend to the contrary. The criterion which causes the majority of my colleagues some consternation is whether the plaintiff's underlying cause of action is meritorious. Disposition of this issue requires only that the plaintiff's claim has some merit, a showing satisfied by an examination of the plaintiff's complaint to determine if it properly states a facially nonfrivolous cause of action. This initial inquiry is not of such scope or magnitude as to require the court to become "enmeshed" in a disposition of the merits of the plaintiff's underlying cause of action. *See Poindexter* v. *F.B.I.*, 737 F.2d 1173, 1187 (D.C. Cir. 1984); *Nelson* v. *Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1983); *Bradshaw* v. *Zoological Society of San Diego*, 662 F.2d 1301, 1308 (9th Cir. 1981).[2]

[2] The separability requirement must also be given a practical construction. As articulated in *Cohen*, it mandates that collateral orders considered for immediate review be not a part of determinations on the merits. In *Coopers & Lybrand* the Supreme Court further explained the separability criterion by requiring the subject matter of a collateral order be reviewable only if it was discrete and not intimately related to the substance of the claim. In *Coopers & Lybrand* the Court held that the class certification issue was too "enmeshed in the factual and legal issues" of the lawsuit to allow for a neat extraction of the question from the entirety of the proceeding for the purposes of immediate appeal.

This was sound reasoning. As has been noted, *see Bradshaw*, *supra*, 662 F.2d at 1307, the class certification determination required detailed and exhaustive factual development of issues such as typicality, adequacy, and a common question; extensive discovery is frequently required. On the other hand, the evaluation required by

To summarize, the resolution of a motion to appoint counsel involves a preliminary matter, i.e. the conclusive determination as to how the trial shall proceed on the merits, i.e. with or without counsel. The issue on its face is "separate from, and collateral to, rights asserted in the action". The resolution concerning the evaluation of merits of the plaintiff's cause of action involves a minimal and incidental inquiry by the Court which in no way enmeshes it in the underlying cause of action itself and the decision to appoint counsel is so mutually independent from the merits of the plaintiffs underlying cause of action and of such critical importance to the conduct of the trial that appellate consideration cannot be deferred to the conclusion of the trial of the case on its merits without irreparable prejudice to the plaintiff.

The majority opinion misconstrues the argument concerning the impact of the congressional intent as reflected by the legislative history of Title VII on decisions to appoint counsel with the casual observation "that if Congress had intended to make these orders immediately appealable, it would have done so". The significance of the congressional intent attaches not to the immediate appealability of a decision denying the appointment of counsel, but rather to the dictates of *Cohen* criterion that the decision is "too important to be denied review . . . until the whole case is adjudicated". *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1226. The promulgation of 42 U.S.C. § 2000e-5(f)(1)(B) and § 2000e-5(k) reflected the deep concern of Congress for the financially inadequate and legally unsophisticated civil rights plaintiff, pitted against his highly trained and skilled legal adversary in an arena of specialized knowledge and technical com-

the appointment decision is brief and easily accomplished. Indeed, it is little more than, and very similar to, a trial court's evaluation of the complaint for assurance that it has jurisdictional authority over the cause. It "simply requires the court to recognize that the underlying claim has some merit. . . . The reference to the merits required. . . . is minimal and incidental". *Id.* at 1308.

plexity, by placing emphasis upon the importance of professional legal representation in civil rights cases and by providing for the appointment of counsel. The issue of the judicial implementation of the congressional mandate and its immediate appealability was left undisturbed within the pronouncement of the Supreme Court in *Cohen* and its progeny.

In approaching a consideration of the final inquiry mandated by the *Cohen* trilogy, I am once again mindful of the Court's admonition to accord its rule a "practical rather than technical construction".

In deliberating the review of an interlocutory decision denying appointment of counsel on an appeal from a final judgment on the merits of a case in a practical rather than technical sense, it is apparent that *Cohen* and its progeny demand something more than merely a procedurally available appeal. Those decisions mandate a formulation of appealability that emphasizes and insures an effective and timely review, not one to be undertaken at some point distant in time that will be too late to meaningfully review the decision denying appointment of counsel and prevent the irreparable loss of the rights conferred by the statute.

At the expense of being repetitious, it should be emphasized that the sensitivity of the congressional conscience to protect civil rights and the importance it placed upon the implementation of the practices and procedures necessary to guard against infringements of these constitutionally protected entitlements is mirrored in the promulgation of legislative enactments designed to insure the appointment of legal counsel for indigent victime. 42 U.S.C. § 2000e-5f(1)(B), 28 U.S.C. § 1915(d).[3]

[3] Congress has also indicated its understanding of the difficulties faced by civil rights litigants. H.R.Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News, 2137, 2148 (emphasis added).

Prior to 1972 the E.E.O.C. had only conciliation powers in obtaining compliance with Title VII of the 1964 Civil Rights Act. Congress significantly strengthened the enforcement powers of the E.E.O.C. in 1972 because of dissatisfaction with implementation of Title VII. While empowering the E.E.O.C. to initiate litigation on behalf of Title VII complainants, the 1972 Amendments also re-enacted the provisions authorizing private individuals to initiate their own civil actions. House Report No. 92-238 on the Equal Employment Opportunity Act of 1972 explains the importance of re-enacting the 1964 language on court appointed counsel. Because of E.E.O.C. staff shortages, parties had had to wait up to three years for final conciliation procedures to be instituted. 1972 U.S. Code Cong., & Ad News, 2137, 2147-48.

As previously pointed out, Congress recognized that a civil rights "complainant who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major produceres, and who has at his disposal a vast array of resources and legal talent".

This imbalance in civil rights litigation is at the center of the right to counsel issue because it illustrates the futility of a civil rights plaintiff who is unable to hire counsel proceeding *pro se* after rejection of such a motion for appointment of counsel. As Congress recognized, rejecting such a motion means that the final curtain drops before the play begins.

A denial of an indigent's right to professional legal representation through timely appointment of legal counsel in advance of the trial of his cause on its merits asserted under legislation which both controls the substance of the litigation and specifically provides for such legal assistance to the indigent without affording an immediate appeal from that decision if it is otherwise qualified under the tenets of *Cohen* and to intentionally compel such a plaintiff, incapable of prosecuting his claim, to proceed *pro se* to ineptly and in ignorance expose his case to the deft and merciless scalpel of a highly trained, and experienced defense counsel for methodical dissection and ultimate destruction and to further aggravate this scenario at the appellate level by again pitting the identical ignorance and ineptitude against professionalism and skill is a patent denial of the victimized individual's constitutionally guaranteed right of access to the courts to vindicate a constitutionally or congressionally created right.

It was tc precisely guarantee this effective access to the courts that Congress mandated the appointment of counsel for *pro se* litigants.

The majority would erroneously equate effective unreviewability with jurisdictional unreviewability. The distinction between *Cohen* reviewability and that proposed by my colleagues was aptly stated in *Robbins* v. *Maggio*, 750 F.2d 405, at 413 (5th Cir. 1985), wherein the court commented:

> [I]t is technically true . . . that a litigant denied appointment of counsel may proceed pro se. . . . . , it is the likelihood that a litigant will not be able effectively to prosecute his claim or to appeal that determines the reviewability of that claim rather than the theoretical existence of the right to proceed with a claim.

In *Bradshaw* v. *Zoological Society* v. *San Diego*, 662 F.2d 1301, 1311-1318 (9th Cir. 1981), the court exhaustively explored the issue of effective *pro se* representation which analysis was conveniently avoided by the majority herein. That evaluation demonstrated that delayed appeals realistically and practically deny effective review and result in a highly prejudicial impact upon the important constitutional and statutory rights involved.[4]

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[4] The comprehensive *Bradshaw* examination of the *pro se* litigant's practical barriers to a meaningful review remains the best explication of the litigant's problems:

> We consider it evident that the effectiveness of appellate review will be seriously impaired by the very nature of the order. A civil rights litigant, untrained in the law, may well decide that he is incapable of handling the trial and drop his claim, commence trial but be compelled to abandon his efforts prior to final judgment, fail on a technicality in any attempt to appeal should be an adverse final judgment on the merits ever be reached, or fail, for lack of legal knowledge, to make the requisite showing to obtain reversal.
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> The liability stage of a Title VII action is complex enough, but the issues involved in formulating the proper remedy strain the ability of many non-specialist practitioners, much less that of a plaintiff without legal training. Should [the plaintiff] obtain any recovery, she may well not pursue an appeal based on the insufficiency of the amount recovered, and should she obtain a monetary recovery, she may well not appeal even though she may be entitled, under the law, to the job she seeks. Without a thorough understanding of the complex legal issues involved and without the ability to appreciate or analyze the possible errors committed in the trial court, [the plaintiff] would hardly be in a position properly to evaluate the question whether an appeal should be taken.
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> [On appeal, the plaintiff] would be bound by the inevitable prejudicial errors she would make at her first trial should she manage subsequently to obtain a reversal and a new trial. She could, for example, be bound by or impeached with her earlier testimony, or suffer adverse consequences from uninformed and unwise stipulations. . . . We must thus be concerned not only with the mechanical complexities of Title VII litigation in the abstract, but also with the prejudicial consequences of a civil rights litigant's lack of capacity to divine and pursue an effective litigation strategy.
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> [I]t is not difficult to imagine — indeed, it is impossible to ignore — the irreparable injury that would result from a refusal to review an order denying a civil rights litigant appointed counsel. Because the likelihood that an applicant . . . will be unable to proceed through trial and obtain effective review of the order is so high, and the prejudice inherent in proceeding to trial without counsel is so great, we do not view the injury that would inevitably result from a refusal to review the order before us as speculative or hypothetical.

Thus, a decision to deny counsel for a *pro se* civil rights litigant is the denial of an "asserted right, the legal and practical value of which would be destroyed if it were not vindicated before trial". *Firestone*, — U.S. at —, 101 S.Ct. at 675 (quoting *United States* v. *MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1552, 56 L.Ed.2d 18 (1978)). *See Robbins* v. *Maggio*, 750 F.2d at 413.

The majority attempts to discredit the appellants arguments in support of interlocutory appeal by citing to the pronouncements of *Flanagan* v. *United States*, — U.S. —, 104 S.Ct. 1051 (1984) as authority for its conclusion that a decision denying appointment of counsel is effectively reviewable on appeal from a final judgment on the merits of the cause. At the outset, it should be noted that the cases factually

common to *Flanagan* do not address the constitutional infringement of access to the courts by refusing legal representation to *pro se* civil rights plaintiffs. To the contrary, in *Flanagan* and factually related cases parties adversely affected by a court's disqualification order were represented throughout the respective proceedings by effective legal counsel albeit not of the party's choice.

In *Flanagan*, the Supreme Court decided that orders granting motions to disqualify counsel were not appealable in criminal cases. The court reasoned that the constitutional right to a speedy trial had to be factored into the analysis and demanded a confined application of the *Cohen* collateral order doctrine in the criminal context. 104 S.Ct. at 1055. The court concluded that an order which disqualified counsel of choice in a criminal case was not sufficiently distinct from the trial on the merits of the criminal prosecution to justify an immediate review because prejudice to a criminal defendant is not presumed in the consideration of a disqualification order as it would be presumed if a criminal defendant was denied his right to appointed legal counsel. The court concluded that a criminal defendant's constitutional rights were not violated unless the disqualification order prejudiced his defense. The court went on to reason that prejudice, if any resulted, could not be meaningfully perceived until after the conclusion of the trial; consequently, the disqualification order did not constitute a separate and collateral issue which was immediately appealable. 104 S.Ct. at 1056.

It is apparent from the Court's discussion that the application of *Cohen* to criminal cases differs significantly from its application in civil litigation. The court's precise language in *Flanagan*, 104 S.Ct. at 1054, concisely stated:

> Because of the compelling interest in prompt trials, the Court has interpreted the requirements of the [*Cohen*] collateral order exception to the final judgment rule [of § 1291] with the utmost strictness in criminal cases. . . . The exceptions to the final judgment rule in criminal cases are rare.

This distinction was previously recognized in *United States* v. *Hollywood Motor Car*, 458 U.S. 263, 265 (1981), and *United States* v. *MacDonald*, 435 U.S. 850, 853 (1978). Other courts have also recognized the difference and declined to apply *Flanagan* in the civil context. *Robbins* v. *Maggio*, 750 F.2d 405, 410-11 (5th Cir. 1985); *American Protection Ins. Co.* v. *MGM Grand Hotel — Las Vegas, Inc.*, 748 F.2d 1293 (9th Cir. 1984); *Panduit Corp.* v. *All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984); *Koller* v. *Richardson-Merrell*, 737 F.2d 1038 (D.C. Cir.), *cert. granted*, 105 S.Ct. 290 (1984); *Interco Systemps, Inc.* v. *Omni Corporate Services*, 733 F.2d 253 (2d Cir. 1984). *But see Gibbs* v. *Paluk*, 742 F.2d 181 (5th Cir. 1984). The court has permitted the application of *Cohen* within a criminal context on only three occasions: *Stack* v. *Boyle*, 342 U.S.1, 72 S.Ct.1, 96 L.Ed.1 (1951), denial a motion to reduce bail; *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), denial of a motion for dismissal of a criminal defendant asserting a double jeopardy defense, and *Helstoski* v. *Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979), denial of a motion of dismissal predicated upon a claim under the "speech and debate" clause of the Constitution.

The review conceived by *Cohen* and its progeny requires, not a procedurally available appeal, but rather, an effective meaningful appellate review. Within this context, the majority's reference to *Coopers & Lybrand* v. *Livesay* erodes rather than fortifies its argument. Initially, the majority ignores the critical distinction between a decision denying appointment of legal counsel and a *Coopers & Lybrand* v. *Livesay* order denying class certification. The Supreme Court's discussion in that case, with obvious clarity, isolated class actions into a special unique classification and circumscribed

its decision, specificaly, to class actions. In simple language, the court stated at 98 S.Ct. 2459:

> There are special rules relating to class actions and, to that extent, they are a special kind of litigation.

In denying class certification decisions access to the "small class" of decisions excepted from the final judgment rule by *Cohen* the *Coopers & Lybrand* v. *Livesay* court reasoned that a class determination generally involves considerations that are intimately enmeshed in the factual and legal issues comprising the merits of plaintiff's cause of action; that such decisions of the trial court incorporate issues concerning class determination, typicality of representatives' claims or defenses, the adequacy of the class representative, the presence or absence of common issues of law or fact, all of which are developed through exhaustive discovery; and which intrude upon the factual and legal issues comprising the plaintiff's underlying cause of action; and finally, an order denying class certification is subject to effective review after final judgment by the named plaintiff or intervening class members.

The appellees have, with great success, subtly misdirected the logic of the majority by distracting their attention with a convoluted interpretation of the *Cohen* and "death knell" doctrines. Appellants, to my understanding of the arguments, have not urged or even suggested that the special recognition and treatment inherent to the "death knell" doctrine be accorded to orders denying appointment of counsel in civil rights cases. The "death knell" argument, permanently laid to rest by the Supreme Court in *Coopers & Lybrand* v. *Livesay*, was resurrected by the appellees. Its precedential value to the case at bar is a mystery and any parallel factual relationship is nonexistent. If the "death knell" doctrine is intended to equate an order denying appointment of counsel to the "death knell" of a *pro se* plaintiff's cause of action,

the majority again misconstrues the teachings of both *Cohen* and *Coopers & Lybrand* v. *Livesay*. The *Cohen* collateral order thesis which has its genesis in 28 U.S.C. § 1291, and which provides for an appeal of right from all final decisions of federal district courts on the merits of a case, defines the criterion to qualify an interlocutory order as final within the terms of that statute. Whereas the "death knell" theory as conceived in *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598, was proposed as a special rule to confer immediate appellate review in class actions which were characterized by the court as unique actions that served the public interest and deserved special rules of appellate review. The "death knell" argument attempted no pretext of evolving from the final judgment requirements of § 1291. Justice Stevens in his *Coopers & Lybrand decision* briefly identified the issue:

> An order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim. Such an order is appealable, therefore only if it comes within an appropriate exception to the final-judgment rule.

437 U.S. at 467, 98 S.Ct. at 2457. Then, in remarkably clear terms, he delineated the two "appropriate exception(s) to the final judgment rule" argued by the respondents:

> In this case respondents rely on the "collateral order" exception articulated by this Court in *Cohen*. . . , *and* on the "death knell" doctrine adopted by several Circuits to determine the appealability of orders denying class certification.

437 U.S. at 467-68, 98 S.Ct. at 2457 (emphasis added).

The court recognized the separateness of the "death knell" presentation in *Coopers & Lybrand* v. *Livesay* and rejected,

in no uncertain terms, that the proposal be recognized as a new and distinct exception to the general rule of finality deserving of a special application to class actions because of the public interest served.[5]

The essence of the "death knell" argument arises not from a denial of the constitutional right of access to the courts, but from a voluntary election to abandon a class action by balancing that decision on a scale of economic feasibility – is it "worth it" to proceed The court consistently emphasized the economic justification to ignore the rule of finality. *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1226. *See also Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation*, — U.S. at —, 103 S.Ct. at 935 n. 14; *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 471, 98 S.Ct. at 2459.[6]

[5] In *Coopers & Lybrand* v. *Livesay*, the "death knell" adherents did not charge that the denial of certification was a final order. They were seeking a special exception to the final judgment rule. *See* 437 U.S. at 471, 98 S.Ct. at 2459. Strictly interpreted, *Cohen* does not pose an exception to the finality rule but an application of the statutory principles which inform § 1291. Rather, it teaches that those principles properly applied and developed result in a more sophisticated understanding and application of § 1291; the "death knell" principles ignore the final order requirements of § 1291 in response to a perceived "vital public interest". As the Court noted, "[s]uch policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide". 437 U.S. at 470, 98 S.Ct. at 2459. *Cf. Robbins* v. *Maggio*, 750 F.2d 405, at 413 n. 11 (5th Cir. 1985).

[6] *See Coopers & Lybrand* v. *Livesay*, 437 U.S. at 469, 98 S.Ct. at 2458 ("[t]he 'death knell' doctrine assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to persue his lawsuit"); *id.*, 437 U.S. at 470, 98 S.Ct. at 2459 (the doctrine has "tactical economic significance" and "economic disincentives"); *id.*, 437 U.S. at 471, 98 S.Ct. at 2459 (under the "death knell" appealability would turn on an evaluation of the economic impact of a pretrial order); *id.*, 437 U.S. at 472-73, 98 S.Ct. at 2460 (doctrine formulates "an appealability rule that turns on the amount of the plaintiff's claim"). *Cf. id.* 437 U.S. at 470 n. 15, 472 n. 18, 98 S.Ct. at 2459 n. 15, 2460 n. 18. It is in the context of the Supreme Court's economic understanding of the "death knell" doctrine that the conclusion articulated by the Court in the final paragraph of the opinion, should be construed when it stated "that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291". *Id.* 437 U.S. at 477, 98 S.Ct. at 2462.

Accordingly, since a decision denying appointment of legal counsel to victims of civil rights violations comes four square within that small class of cases which finally determine claims of right separable from, and collateral to, rights asserted in the underlying action on the merits, too important to be denied review and too independent of underlying cause itself to require that appellate consideration be deferred until the entire case is adjudicated and which qualifies under the criteria of *Cohen* v. *Beneficial Loan Corporation* and its progeny, and for the reasons hereinbefore stated, I herewith respectfully enter my dissent.

JONES, Circuit Judge, dissenting, joined by EDWARDS, Circuit Judge. Although I agree fully with the reasoning of Judge Krupansky's dissent, I dissent separately to emphasize, under the circumstances here, the appropriateness of recognizing an exception for civil rights cases. As Judge Krupansky notes, *supra* pages 22-23 n.3, Congress itself provides support for treating civil rights cases different from civil or criminal cases. In adopting 42 U.S.C. § 2000e-5f(1)(B), Congress expressly recognized that a distinctive characteristic of civil rights plaintiffs is membership in a disadvantaged class. By contrast, civil rights defendants are typically institutions, capable of wielding great resources and mustering extensive legal talent. H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2140. The civil rights action itself involves discovery and motions practice so complex that the plaintiff may drop the case before trial. Along with Judge Krupansky and the Ninth Circuit, I am unwilling to assume "that civil rights plaintiffs are capable of prosecuting their own cases through trial . . . [and] that should they somehow succeed in doing so, they will have the determination and capability to perfect and conduct appeals properly and fully after they lose." *Bradshaw* v. *Zoological Society of San Diego*, 662 F.2d 1301, 1310 (9th Cir. 1981). Such a notion wars with reality. It seems to me that Congress has spoken clearly on its desire that civil rights cases be decided on their merits and that counsel be appointed when necessary to assure this. As judges, our task is to strive to conform to the will of Congress, not to contest it. The position advanced in the dissent is in conformity with Congressional intent.

SUPPLEMENTAL BRIEF

85-297

No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ARTELL M. HENRY, *et al.*,
Petitioners,

v.

CITY OF DETROIT MANPOWER DEPARTMENT, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR CERTIORARI

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August 9, 1985

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United States District Court

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ARTELL M. HENRY,
Plaintiff,

v.

CITY OF DETROIT,
MANPOWER DEPARTMENT,
Defendant.

Civil Action
No. 79-73393

ORDER OF REFERENCE TO MAGISTRATE

Pursuant to the resolution adopted by the Judges of this Court, it is hereby ordered that the above-entitled cause be assigned to United States Magistrate Paul J. Komives for a trial on the merits. This referral is made with the consent of both parties to the suit.

/s/ JOHN FEIKENS

John Feikens
Chief United States
District Judge

Date: September 9, 1981

In accordance with the above Order, this case has been assigned to United States Magistrate Paul J. Komives for a trial on the merits.

A copy of this Order of Reference shall be forwarded to the above-named Magistrate by the Clerk.

John P. Mayer, Clerk

By: /s/ BONNIE HUMM

Deputy Clerk

Date: September 9, 1981

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTELL M. HENRY,
Plaintiff,

v.

CITY OF DETROIT,
MANPOWER DEPARTMENT,
Defendant.

Civil Action
79-73393

ORDER DENYING REQUEST TO CANCEL ORDER OF REFERENCE TO MAGISTRATE

At a session of said Court, held in the Federal Building and United States Courhouse, City of Detroit, County of Wayne, State of Michigan, on the eighteenth day of September, 1981.

Present: JOHN FEIKENS
Chief United States District Judge

This matter having come before the Court on a request to cancel my order of September 9, 1981, referring this matter to Magistrate Paul Komives, and the Court having conducted a full hearing on September 8, 1981, at which this matter was considered, and the Court being fully advised in the premises,

IT IS ORDERED that the above-entitled case be, and the same hereby is, referred to Magistrate Komives, and

IT IS FURTHER ORDERED that no attorney will be appointed for plaintiff in this matter.

/s/ JOHN FEIKENS
John Feikens
Chief United States
District Judge

United States District Court

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DOUGLAS L. GORDON,
Plaintiff

v.

GEORGE W. WILSON, *et al.*,
Defendants

No. 81-0170 P(J)

ORDER

This matter is before the Court on a motion to approve and appoint John Gosnell as counsel for the plaintiff herein; it appearing that this Court has previously ruled on said motion by Order dated October 19, 1981; and the Court being sufficiently advised;

It is hereby ORDERED that the motion to approve and appoint counsel is DENIED.

Date: 10/29/81

/s/ W. DAVID KING
W. David King
United States Magistrate

IN THE

United States District Court

FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NORMAN E. COX

v.

UNION CARBIDE CORPORATION

CIV. 3-81-472

ORDER

It is ORDERED that plaintiff's motion to stay depositions and for appointment of counsel be, and the same hereby are, denied.

Enter:

/s/ ROBERT L. TAYLOR
United States District Judge

United States District Court

FOR THE
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RONNY LEE PARRISH,
Plaintiff

v.

JOHN O. MARCH, JR.,
Secretary of the Army
Defendant

No. C 81-0232-L(B)

MEMORANDUM

This Title VII action is before the Court on the motion of the plaintiff for the appointment of counsel.

Section 706(f) of Title VII, 42 U.S.C. Section 2000e-5(f)(1), confers discretion on the district court to appoint counsel to represent plaintiff in an employment discrimination case. Among the factors to be considered are the efforts plaintiff has made to obtain counsel, his or her financial ability to obtain counsel, and the merits of plaintiff's claim.

Pursuant to the guidelines set forth in *Jones v. WFYR Radio/RKO General*, 626 F.2d 576 (7th Cir. 1980), this Court held an informal hearing on November 16, 1980, at which plaintiff appeared. While no extensive record has been constructed, the Court has examined the Army's files concerning this controversy and the Court has also endeavored to evaluate plaintiff's statements and arguments. We conclude that for at least 2 reasons, plaintiff's motion should be denied.

First, the record discloses that plaintiff has not been discharged. The record indicates that plaintiff is now on leave without pay as the result of what he claims is a disability. At

the informal hearing plaintiff readily conceded that he is unable to return to work and he further asserted that he has been told by his physician and a psychologist that it is unlikely that his condition will ever improve to the point that he can return to his previous occupation. That his claim for disability retirement was not approved is of no significance to the matter before the Court.

The second reason that we conclude dictates the denial of plaintiff's motion is that he has not shown that he has exhausted his administrative remedies. At the hearing plaintiff asserted that he tried to file a formal complaint but that he was frustrated at every turn. While it may be that plaintiff honestly believes that he has tried to the ultimate limit to exhaust his remedies, the record refutes his contention. There are repeated references in the record to the effect that plaintiff told representatives of defendant that he had decided not to pursue his claim through the Equal Employment Opportunity Office but that he would use other channels. See, e.g., the affidavit of Dolores C. Symons filed October 23, 1981. The Court believes that the records of defendant are the more credible evidence and concludes that plaintiff did not exhaust his administrative remedies.

Plaintiff's motion for the appointment of counsel will be denied, and an appropriate Order has been entered this 18th day of November, 1981.

/s/ THOMAS A. BALLANTINE, JR.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Plaintiff
Counsel of record

United States District court

FOR THE
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RONNY LEE PARRISH,
Plaintiff

v.

JOHN O. MARSH, JR.,
Secretary of the Army
Defendant

No. C 81-0232-L(B)

ORDER

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the plaintiff, Ronny Lee Parrish, for the appointment of counsel pursuant to Title 42 U.S.C. Section 2000e-5(f)(1) be and it hereby is denied.

There is no just reason for delay, and this is a final and appealable Order.

This 18th day of November, 1981.

/s/ THOMAS A. BALLANTINE, JR.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Plaintiff
Counsel of record

OPPOSITION

BRIEF

No. 85-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTELL M. HENRY, ET AL.,
Petitioners,

vs.

CITY OF DETROIT MANPOWER DEPARTMENT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF OF UNION CARBIDE CORPORATION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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No. 85-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTELL M. HENRY,
Petitioner,

vs.

CITY OF DETROIT MANPOWER DEPARTMENT,
Respondent.

DOUGLAS L. GORDON,
Petitioner,

vs.

GEORGE WILSON, AL PARKE, DR. HODGE,
Respondents.

NORMAN E. COX,
Petitioner,

vs.

UNION CARBIDE CORPORATION,
Respondent.

RONNY LEE PARRISH,
Petitioner,

vs.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF OF UNION CARBIDE CORPORATION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

REASONS FOR NOT GRANTING THE WRITS[1]

Petitioners have stated five reasons why they believe the writs should be granted in these cases. Union Carbide Corporation[2] (Carbide) disagrees with each of the reasons stated by the Petitioners and opposes the granting of the writs.

I The Conflict Among The Circuits Does Not Warrant Granting The Writs At This Time.

Carbide does not dispute the existence of a conflict among the circuits on the question whether an order denying the appointment of counsel is appealable under 28 U.S.C. § 1291. (Petitioners' brief, p. 5.)

In this instance, however, the conflict must be viewed in light of the fact that almost all of the circuits' decisions were issued before *Flanagan v. United States,* ____ U.S. ____, 79 L.Ed.2d

[1] Union Carbide Corporation accepts the Petitioners' statement of the case, their statement of the questions presented and the sections of their brief relating to the opinions below, jurisdiction and the statutes involved.

[2] The following information is stated pursuant to Rule 28.1 of this Court. Carbide is incorporated under the laws of the state of New York. Its subsidiaries (except wholly owned subsidiaries) and affiliates are listed in Appendix A hereto.

288 (1984),[3] and that none of the circuits has addressed the question at issue since this Court decided *Richardson-Merrell, Inc. v. Koller,* ____ U.S. ____, 86 L.Ed.2d 340 (1985), and *Mitchell v. Forsyth,* ____ U.S. ____, 86 L.Ed.2d 411 (1985).

Contrary to Petitioners, Carbide believes that the Court's three most recent decisions dealing with the appealability of interlocutory orders (*Flanagan, Richardson-Merrell* and *Mitchell)* provide the guidance needed to resolve the question at issue here. At the very least, the lower courts should be given the opportunity to assess the impact of those decisions. Under these circumstances, Carbide submits, the conflict among the circuits does not provide a basis for granting the writs.

II Orders Denying The Appointment Of Counsel Are Not Immediately Reviewable Under The Cohen Doctrine.

Petitioners contend that orders denying the appointment of counsel meet the three-part test stated in *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978), for determining the application of the "collateral order doctrine".[4] Carbide contends that such

[3] Only four have been issued since *Flanagan.* In one of the four decisions, *Slaughter v. City of Maplewood,* 731 F.2d 587 (8th Cir. 1984), the court of appeals did not even consider *Flanagan.* In another, *Robbins v. Maggio,* 750 F.2d 405 (5th Cir. 1985), the court seemed to restrict the rationale of *Flanagan* to criminal cases, a conclusion since dispelled by *Richardson-Merrill, Inc. v. Koller,* ____ U.S. ____, 86 L.Ed.2d 340 (1985). In the present case, *Henry v. City of Detroit Manpower Dept.,* 763 F.2d 757 (6th Cir. 1985), and in *Smith-Bey v. Petsock,* 741 F.2d 22 (3d Cir. 1984), the courts found that *Flanagan* did provide sufficient guidance and in both the order denying appointment of counsel was held to be non-appealable.

[4] The collateral order doctrine is of course a "narrow exception" to the final judgment rule. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981). "To fall within the exception, an order must *at a minimum* satisfy [the] three conditions..." discussed above. *Richardson-Merrell, Inc. v. Koller,* ____ U.S. ____, 86 L.Ed.2d 340, 346 (1985) (emphasis added).

orders do not meet *Coopers'* three-part test.

Petitioners argue that an order denying the appointment of counsel conclusively determines the issue "[b]ecause there is no reason to expect revision of orders denying the appointment of counsel during trial..." (Petitioners' brief, p. 6.) This argument misses the mark.

The Sixth Circuit held in *Henry* that orders denying the appointment of counsel are "tentative", subject to revision, and should be presumed so unless they state otherwise. *Henry,* 763 F.2d at 762. This holding comports with the Court's statement in *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1969), that 28 U.S.C. § 1291 should be given a "practical rather than as technical construction". Id., at 46.[5]

Describing an order denying the appointment of counsel as tentative is entirely accurate. As shown by the cases cited in footnote 6, district courts frequently deny motions with leave to renew them later. And as the *Henry* court says, motions for the appointment of counsel often are made in the first instance at an early stage of the proceedings, before the record has been developed to the point that the trial judge can make anything more than a provisional ruling on the motion.

If the plaintiff's initial motion is overruled, there is no reason to treat the order as "final" and thus preclude the district judge from later reconsidering the motion if circumstances warrant

[5] If an order denying class certification is tentative, even though its immediate effect is to sound the "death knell" of the litigation, it is difficult to see how an order denying the appointment of counsel can be treated differently. *Coopers & Lybrand,* 437 U.S. at 467-70.

it.[6] Treating the initial denial as an appealable order takes away much of the discretion given to district judges by 28 U.S.C. § 1291 and paves the way for appeals that are unnecessary, unwarranted and in most instances unavailing.

An order denying the appointment of counsel also fails to meet the other two tests laid down by *Coopers & Lybrand* — that the order resolve an important issue completely separate from the merits of the action and that it be effectively unreviewable.

Judge Merritt's concurring opinion in *Henry* succinctly refutes Petitioners' argument that an order denying the appointment of counsel is effectively unreviewable unless it is appealable as a matter of right. Judge Merritt said: "Whether an error has been made respecting the appointment of counsel in civil rights cases can be corrected just as easily after final judgment as in other cases....Once a final judgment is entered, we can review the actions of the District Court regarding legal counsel, just as we review actions on other motions". *Henry,* 763 F.2d at 764.

Petitioners' argument that an order denying counsel sounds the "death knell" to the case, because the plaintiff will likely drop the case rather than try it pro se, is based primarily on supposition and appears to be at odds with *Coopers & Lybrand* (see footnote 5, supra) and with experience. See, *e.g., Bradshaw v. United States District Court,* 742 F.2d 515 (9th Cir. 1984) (pro

[6] See, e.g., *Sol v. I.N.A. Ins. Co.,* 414 F.Supp. 29, 30 (E.D. Penn. 1976) (motion for appointment overruled "without prejudice", to be reconsidered if it appears plaintiff has a meritorious claim which he cannot adequately pursue pro se); and *Galloway v. Trans Freight Lines,* ____ F.Supp. ____, 38 FEP 340, 341 (D. N.J. 1985) (application for appointment of counsel denied until plaintiff shows he has a meritorious claim that he cannot adequately pursue pro se); *Boone v. Philadelphia Gear Corp.,* ____ F.Supp. ____, 34 FEP 329 (E.D. Penn. 1984) (motion for appointment overruled without prejudice to renew "with appropriate supporting documentation").

se plaintiff appealed to the Ninth Circuit three times before the case was heard on the merits).

In ruling on a motion seeking counsel, the trial judge is required to review the merits of the claim, 2 Larson, *Employment Discrimination,* § 49.82(c), and to consider the capacity of the plaintiff to present the case adequately without the aid of counsel. *Poindexter v. FBI,* 737 F.2d 1173 (D.C. Cir. 1984). Whether or not counsel should be appointed is thus not an issue completely separate from the merits.

III Immediate Review Does Not Serve The Needs Of Justice Or Of Efficient Judicial Administration.

Petitioners argue that treating orders denying the appointment of counsel as final will promote efficient judicial administration, maintain the proper relationship between trial and appellate courts and prevent delay. Carbide believes that treating such orders as final will accomplish none of those objectives.

"The number of cases in federal Courts of Appeal has risen tenfold in the last 20 years. There is no reason to add piecemeal appeals to our present case load by making interlocutory rulings in civil cases immediately appealable". *Henry,* 763 F.2d at 764 (concurring opinion of Judge Merritt).[7]

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[7] Judge Merritt's observation is correct. Statistics show that during the 12 month period ending June 30, 1983, "the number of appeals filed, terminated and pending in the U. S. Courts of Appeal reached the highest level ever recorded in a statistical year". *Annual Report of the Director of the Administrative Office of the United States Courts,* pp. 97 and 99 (1983) (hereinafter called *Annual Report,* 1983) The same is true of the number of filings in the federal district courts. *Annual Report,* 1983, pp. 114 and 118. "During the 12 month period ended June 30, 1983, there were 19,735 civil rights cases filed, an increase of 15.8 percent over the 17,038 cases filed in 1982. The most substantial increases in civil rights litigation were in public accomodations and employment discrimination cases, which rose 24.9 percent and 18.3 percent, respectively". *Annual Report,* 1983, p. 134.

A holding that allows an appeal from an order denying the appointment of counsel could well have "a serious debilitating effect on the administration of justice". *Coopers & Lybrand,* 437 U.S. at 473, for as Judge Brown said in the Sixth Circuit's first *Henry* decision, 739 F.2d at 1109 (1984), 1119, such a holding "...will invite numerous — if not automatic — appeals of decisions frequently made on incomplete and developing records".

Inasmuch as "[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts", *Richardson-Merrell,* ____ U.S. ____, 86 L.Ed.2d at 340, there is little justification for creating an exception to the final judgment for orders denying the appointment of counsel. Carbide believes Judge Friendly was right when he said, in *Donlan Industries, Inc. v. Forte,* 402 F.2d 935, 937 (2d Cir. 1968), that "...since review would be limited to 'abuse' of discretion, the likelihood of reversal is too negligible to justify the delay and expense incident to an appeal and the consequent burden of hardpressed appellate courts".

The Petitioners contention that allowing an appeal would help to maintain the proper relationship between trial and appellate courts runs counter to Congress's judgment "...that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second guess pre-judgment rulings". *Richardson-Merrell,* 86 L.Ed.2d at 350.

Moreover, an appeal from an order denying counsel creates rather than prevents delay. An interlocutory appeal prevents delay only if one presumes that district courts will routinely abuse their discretion. But such a presumption is untenable. True, district courts will sometimes err, but as this Court said in *Richardson-Merrell,* "[w]e do not think that the delay resulting from the occasionally erroneous [ruling of the district courts on

the issue of] disqualification outweighs the delay that would result from allowing piecemeal appeal of every order disqualifying counsel", 86 L.Ed.2d at 349.

IV The Contentions That The Writs Should Be Granted To Enable Petitioners To Vindicate Their Civil Rights And Because The District Courts Abused Their Discretion.

For the reasons already stated, Carbide submits that neither of the grounds stated in the caption warrants the grant of the petition in these cases.

CONCLUSION

The final judgment rule is designed to protect the integrity of the appellate process and to insure the efficient and economical operation of the judicial system. It is one thing to create an exception to the rule with regard to an issue that arises infrequently, quite another to create an exception, particularly an unneeded one, with regard to an issue that will arise often. Title VII litigants constitute a large class of litigants (see footnote 7). Adopting the view urged by the Petitioners "...will invite numerous — if not automatic — appeals of decisions frequently made on incomplete and developing records". *Henry,* 739 F.2d at 1119 (dissenting opinion of Judge Brown).

The solution to the question at issue does not lie in creating an exception to the final judgment rule for orders denying the appointment of counsel. Rather, it lies in clearly articulating standards to guide district courts in deciding motions seeking the appointment of counsel, thus insuring "...that the trial level is where the decision to appoint will be made". *Poindexter v. FBI,* 737 F.2d 1173, 1189 (D.C. Cir. 1984). This is what the Sixth Circuit did in the present case and what the court of appeals did in *Poindexter* and in *Jenkins v. Chemical Bank,* 721 F.2d 876 (2d Cir. 1983).

Carbide submits that the petition for writs of certiorari should be denied.

Respectfully submitted,

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OF COUNSEL:

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APPENDIX

APPENDIX A

Union Carbide Corporation

AFFILIATED COMPANIES

(Associated & Minority Interest Companies)

	Place of Incorporation	UCC % of Ownership
ACM Services, Inc.	Texas	33.33%
Administracion y Servicios Carmex, S.A., DE C.V.	Mexico	45.7%
P.T. Argocarb Indonesia	Indonesia	80%
Agromore, Ltd.	India	25%
Andaluza De Gases	Spain	24.97%
Argon, S.A.	Spain	50%
Arizona Welding Equipment Co.	Delaware	50%
Beralt Tin and Wolfram Limited	U.K.	25%
BRASOX Industria e Comercia Limitada	Brazil	50.14%
Calida Gas B.V.	Netherlands	52.5%
Carbide Hashim Industrial Gases Company	Saudi Arabia	25%
Chemos Industries Pty. Limited	Australia	60.02%
Chrome Corporation (South Africa) (Proprietary) Limited	Rep. So. Africa	97.10%
Cia. National de Calcareos e Derivados	Brazil	50.14%
Compagnie Francaise de Produits Industriels	France	25%
Dai Nippon Jushi Company, Ltd.	Japan	25%
Delvan Pty. Limited	Australia	60.02%
Elektrode Maatskappy van Suid-Afrika (Eiendoms) Beperk	Rep. So. Africa	50%
Electro Manganes Ltda.	Brazil	55%
Eletrometalurgica Saudade Ltda.	Brazil	50.14%
Empress Brasileira de Reflor-estamento e Agro-Pecuaria Ltda.	Brazil	50.14%
Empress Brasileira de Cilindros Ltda.	Brazil	50.14%
Greenwich Oil Corporation	Delaware	35%
I.G.I. — Italiana Gas Indus-triali S.p.A.	Italy	50%

Incarmex, S.A. de C.V.	Mexico	45.7%
Indugas N.V.	Belgium	50%
Indugas Nederland B.V.	Netherlands	50%
Joint Industries (HYCEL) 1970 Limited	New Zealand	60.02%
Karaj Road Property Company Limited	Iran	99.9%
Miami Welding Supply, Inc.	Florida	50%
Nepal Battery Company Limited	India	39.44%
Nippon Unicar Company Limited	Japan	50%
Nitropet, S.A.	Mexico	36.56%
Oxigenio Edy, S.A.	Brazil	50.14%
Oxigenio Del Norte, S.A.	Spain	25%
Rhee Beheer B.V.	Netherlands	25%
Servicios Administrativos Carmex, S.A. de C.V.	Mexico	45.7%
Servicios DYC, S.A. de C.V.	Mexico	45.7%
Societe Civile des Produits Lifine	France	50%
Sony-Eveready Inc.	Japan	50%
Tenngasco Gas Gathering Company	Delaware	13.78%
Tubatse Ferrochrome (Proprietary) Limited	South Africa	49%
Tubatse Mining and Quarrying (Pty.) Ltd.	South Africa	49%
UCAR Plastics (Ghana) Limited	Ghana	50%
Union Carbide Argentina, S.A.I.C.S.	Argentina	99.99%
Union Carbide Australia & New Zealand	Australia	60.02%
Union Carbide Australia Limited	Australia	60.02%
Union Carbide Canada Limited	Canada	74.73%
Union Carbide Ceylon Limited	Sri Lanka	60%
Union Carbide Egypt, S.A.E.	Egypt	75%
Union Carbide Employees' Bhopal Relief Fund, Inc.	Connecticut	**
Union Carbide France, S.A.	France	99.988%
Union Carbide Ghana Limited	Ghana	66⅔%
Union Carbide India Limited	India	50.9%
Union Carbide Kenya Limited	Kenya	65%
Union Carbide Malaysia Sdn. Bhd.	Malaysia	80%

Union Carbide Mexicana, S.A. de C.V.	Mexico	45.7%
Union Carbide New Zealand	Australia	60.02%
Union Carbide Nigeria Limited	Nigeria	60%
Union Carbide Pakistan Limited	Pakistan	60%
Union Carbide Sudan Limited	Sudan	84%
Union Gas Company Limited	Rep. of So. Korea	86.15%
Union Polymers Sdn. Bhd.	Malaysia	60%
Union Showa K.K.	Japan	50%
United States Welding, Inc.	Colorado	50%
V.B. Adnerson Co.	California	85.33%
Sociedade Anonima White Martins	Brazil	50.14%
S.A. White Martins Nordeste	Brazil	50.14%

** Non-Profit Organization — No shares

Union Carbide Canada Limited Subsidiaries:

	Place of Incorporation	UCC % of Ownership
Acetogen Welding Supplies Ltd.	British Colombia	74.73%
Ampro Oxygen Ltd.	Quebec	74.73%
Apex Bio-Resources Ltd.	British Colombia	37.36%
Atlantic Oxygen Ltd.	Nova Scotia	74.73%
B-C Oxygene Ltee.	Quebec	37.36%
B. C. Welding Supplies Ltd.	British Colombia	37.36%
Borstad Welding Supplies Ltd.	Canada	37.36%
Brouillette Gas & Welding Supplies Ltd.	Quebec	74.73%
Brunswick Oxygen & Welding	New Brunswick	33.62%
Buckwold Welding Supplies Ltd.	Manitoba	74.73%
Campbell Films Limited	Ontario	74.73%
Canadian Welding Gases Limited	Ontario	74.73%
Coastal Plastics Limited	Nova Scotia	74.73%
Consumers Welders Supplies Inc.	Alberta	65.38%
Dominion Viscose Products Limited	Ontario	74.73%
Ernest Gilbert Inc.	Quebec	59.78%
Graphic Flexible Packaging Ltd.	Ontario	74.73%
Island Welding Supplies Ltd.	British Colombia	37.36%
L. & L. Equipment Ltd.	British Colombia	37.36%
Les Industries Wedco Ltee.	Canada	38.11%
M & M Supplies Ltd.	New Brunswick	37.36%
Medigas (Alberta) Limited	Alberta	74.73%
Medigas Atlantic Limited	Nova Scotia	74.73%
Medigas Eastern Ontario Limited	Ontario	37.36%
Medigas Limited	Ontario	37.36%
Medigas New Brunswick Limited	New Brunswick	74.73%
Medigas (Newfoundland) Limited	Newfoundland	74.73%
Medigas Pacific Limited	British Colombia	37.36%
Medigas (P.E.I.) Ltd.	Prince Edward Island	74.73%
Medigas (Quebec) Limited	Quebec	33.62%
Medigas (Saskatchewan) Limited	Saskatchewan	74.73%
Medigas (Territories) Limited	North West Territory	74.73%
Medigaz de la Capitale Incorporee	Quebec	56.04%

Merlund Plastics Ltd.	Alberta	74.73%
Metalwelding Supply Company Limited	Ontario	74.73%
Morgan Welding Supply Company Limited	Ontario	37.36%
Niagara Welders Supply Limited	Ontario	74.73%
North Shore Oxygen (1969) Inc.	Quebec	37.36%
Petromont Inc.	Quebec	62.27%
Petrosar Limited	Ontario	25.26%
Richelieu Welding Supplies Ltd.	Quebec	74.73%
Rioux Oxygen Inc.	Quebec	37.36%
Rocky Mountain Welding Supplies Ltd.	British Colombia	74.73%
Saguenay Oxygene (1968) Ltee.	Quebec	38.11%
Supreme Welding Supplies Limited	Ontario	74.73%
Tri-Valley Welding Products Inc.	Ontario	74.73%
Vandry Gas & Welding Products Ltd.	Quebec	74.73%
Weldarc Limited	Ontario	74.73%
Welders Supplies Limited	Ontario	65.38%
Welders Supply Company	Ontario	37.36%
Wetmore Welding Supplies Limited	Ontario	37.36%

OPPOSITION

BRIEF

(3)

No. 85-237

In The

Supreme Court of the United States

October Term, 1985

ARTELL M. HENRY, et al.,

Petitioners,

vs.

CITY OF DETROIT MANPOWER DEPARTMENT, et al.,

Respondents.

RESPONDENT CITY OF DETROIT MANPOWER DEPARTMENT'S

BRIEF IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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24 pp

QUESTIONS PRESENTED FOR REVIEW

I.

IS A DISTRICT COURT'S ORDER DENYING A REQUEST FOR COURT-APPOINTED COUNSEL UNDER 42 U.S.C. § 2000e-5(f)(1)(B) IMMEDIATELY APPEALABLE?

II.

DID THE DISTRICT COURT IN THIS CASE ABUSE ITS DISCRETION IN DENYING THE REQUEST FOR APPOINTED COUNSEL?

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In The

Supreme Court of the United States

October Term, 1985

ARTELL M. HENRY,
Petitioner,
vs.
CITY OF DETROIT MANPOWER DEPARTMENT,
Respondent.

DOUGLAS L. GORDON,
Petitioner,
vs.
GEORGE WILSON, AL PARKE, DR. HODGE,
Respondents.

NORMAN E. COX,
Petitioner,
vs.
UNION CARBIDE CORPORATION,
Respondent.

RONNY LEE PARRISH,
Petitioner,
vs.
JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
Respondent.

RESPONDENT CITY OF DETROIT MANPOWER DEPARTMENT'S

BRIEF IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

I.

DISTRICT COURT ORDER

Artell Henry filed a complaint with the Equal Opportunity Commission (EEOC) alleging the City of Detroit, Manpower Department discriminated against him in his employment on the basis of his Jamaican origin. After receiving a right to sue letter, he filed an action under Title VII of the Civil Rights Act of 1964 in the Eastern District of Michigan. He requested counsel be appointed pursuant to 42 U.S.C. § 2000e-5(f)(1)(B). The district court made two attempts to do so to no avail. Finally, the court denied Mr. Henry the right to appointed counsel in this matter. (Supp. App. SA-2)

Henry immediately appealed that order to the Sixth Circuit Court of Appeals.

The Sixth Circuit consolidated this case with three others where appointed counsel was denied for purposes of argument in that forum.

II.

PANEL OF THE SIXTH CIRCUIT COURT OF APPEALS

The common issues on appeal of the consolidated cases were: 1) whether the orders denying the right to counsel are final decisions that are appealable under 28 U.S.C. § 1291 and 2) whether the district court abused its discretion in denying the request for appointed counsel.

A panel of the Sixth Circuit Court of Appeals held on July 20, 1984 that these orders were appealable as final decisions under 28 U.S.C. § 1291. The Court found that these orders were "collateral decisions" under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978). The test of appealability of such "collateral decisions" is whether or not they constitute a final order, separable from the merits of the claim, and cannot be effectively reviewed on appeal from a final judgment. (App. A1-20)

The panel went on to deal with each case on the merits. With respect to *Artell Henry* v. *City of Detroit*, the panel found that the district court had not abused its discretion in denying counsel to plaintiff Henry. (App. A-18)

III.

EN BANC REHEARING BY THE SIXTH CIRCUIT COURT OF APPEALS

The Sixth Circuit on its own motion conducted an en banc rehearing of this case. In its decision, the Court ruled that pursuant to the three-pronged test elucidated in *Coopers & Lybrand* v. *Livesay, supra,* the appellants had met none of the requirements in order to justify immediate appeal under 28 U.S.C. § 1291. (App. B1-17)

There were two dissenting opinions which adopted the Sixth Circuit Panel's original decision and would have created an additional exception for Civil Rights cases. (App. B17-30)

It is from this order that petitioners seek review by this Court.

REASONS FOR DENYING WRITS OF CERTIORARI

I.

THE GENERAL RULE

As a general rule, U.S. Circuit Courts of Appeals have jurisdiction to hear appeals of final decisions rendered by federal district courts, pursuant to 28 U.S.C. § 1291.

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

A "final decision" was defined by the Supreme Court as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233; 89 L. Ed. 911, 916; 65 S. Ct. 631 (1945).

None of the parties to this litigation claim the orders to deny appointment of counsel under review by this Court resulted in final judgments which terminate the various lawsuits; the Plaintiffs are free to proceed *pro se*. What is disputed is whether these orders fall within an exception to the final judgment rule, as collateral orders.

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the Court held that an order denying a motion to disqualify counsel of the opposing party in a civil case was not a final decision within the meaning of 28 U.S.C. § 1291. The Court explained the reasons for requiring a final decision prior to appeal.

> "This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the

> individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigant may give rise, from its initiation to entry of judgment.'" *Id.* at 374.

The circuit courts of appeals are split as to whether an order denying appointment to counsel is immediately reviewable. With the Sixth Circuit's en banc decision in this matter, there are now 6 circuits which hold it is not.[1] Four circuits have held that they are immediately reviewable.[2]

As will be shown here, the orders complained of in this appeal are not immediately reviewable since they do not meet the tests elicited by this Court.

---

[1] *Smith-Bey* v. *Petsock*, 741 F.2d 22 (3rd Cir. 1984); *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983); *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981); *Cotner* v. *Mason*, 657 F.2d 1390 (10th Cir. 1981); *Miller* v. *Pleasure*, 425 F.2d 1205 (2nd Cir.), *cert. denied*, 400 U.S. 880 (1970).

[2] *Robbins* v. *Maggio*, 750 F.2d 405 (5th Cir. 1985); *Slaughter* v. *City of Maplewood*, 731 F.2d 587 (8th Cir. 1984); *Brooks* v. *Central Bank of Birmingham*, 717 F.2d 1340 (11th Cir. 1983) (adopting as precedent *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1979)); *Bradshaw* v. *Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981).

II.

ARTELL HENRY, et al. ARE NOT CASES WHICH CONSTITUTE EXCEPTIONS TO THE USUAL RULE THAT ORDERS MUST BE FINAL PRIOR TO APPEAL.

As noted, *Catlin* v. *United States, supra,* establishes the definition of "final decision".

Given that interpretation, the two questions that need to be resolved in the instant matter are: are there exceptions to the general rule, and does the order in *Artell Henry* qualify as one of the exceptions?

That exceptions can be made to the final judgment rule was noted in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546; 93 L. Ed. 1528; 69 S. Ct. 1221 (1949). The Court held that a small class of decisions exist which finally determine rights separable from, and collateral to, rights asserted in the district court action, too important to be denied appellate review and too independent of the cause itself to require that appellate consideration be deferred until the entire case is fully adjudicated.

The Court has elaborated on the *Cohen* exception many times in the last four decades (*c.f. Coopers & Lybrand* v. *Livesay*, 437 U.S. 463; 57 L. Ed. 2d 351; 98 S. Ct. 2454 (1978); *Catlin* v. *United States*, 324 U.S. 229; 89 L. Ed. 911; 65 S. Ct. 631 (1945); *Cobbledick* v. *United States*, 309 U.S. 323; 84 L. Ed. 783; 60 S. Ct. 540 (1940); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156; 40 L. Ed. 2d 732; 94 S. Ct. 2140 (1974); *Abney* v. *United States*, 431 U.S. 651; 52 L. Ed. 2d 651; 97 S. Ct. 2034 (1977).

However, the specific requirements were set out by this Court in *Coopers & Lybrand* v. *Livesay, supra,* when this Court stated:

> "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed questions, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 468.

This Court's most recent pronouncement on the issue of appealability of interlocutory orders came in *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984). In this criminal case, the Court ruled that an order disqualifying defendant's counsel was not immediately appealable under Section 1291. In its decision the Court found that the order in question did not meet the separability requirement and likewise it was not shown that it could not be effectively reviewed at the conclusion of the case. While not dealing directly with the orders in the cases in this appeal, it is further evidence of this Court's reluctance to expand the rule regarding collateral orders. The *Cohen* case and those which have followed each speak to a limited application or a small group of cases and not a court-created rule which would eradicate the meaning of Section 1291.

Applying the *Coopers & Lybrand* test to the *Artell Henry* case, it is clear that *Henry* does not meet all the criteria necessary to establish a "collateral decision".

In *Henry* v. *City of Detroit Manpower Department*, we can determine that the district court's order denying appointment of counsel conclusively determined that Mr. Henry would not be assisted by a lawyer appointed by the court. (Mr. Henry may proceed with his lawsuit *pro se* or he may locate an attorney that is willing to represent him on a contingency fee basis.) We can also conclude that the issue of appointing an attorney by the court is easily distinguished from those raised in

Mr. Henry's complaint of employment discrimination based upon his national origin.

The third standard for collateral orders, however, is not satisfied; the effect of nonappointment of counsel is reviewable following a final district court judgment. In fact, if Mr. Henry proves his claims of employment discrimination in district court, there will be no need to contemplate the effect of nonappointment at all.

If Mr. Henry, or any of the other plaintiffs in this matter, can effectively show the elements of the cause of action, appointment of counsel will be proven unnecessary.

Denial of a motion to appoint counsel is not a collateral decision subject to immediate appellate review as it is an interlocutory order which can be fully reviewed at a later time and, if necessary, any error may be later remedied.

Before leaving the issue of appointment of counsel constituting a collateral order, one should note the growing number of decisions by federal appellate courts resisting further extension of the *Cohen* rule and the trends in the law. The collateral order doctrine emerged at a time when the final judgment rule was interpreted without flexibility. Since that time, appellate jurisdiction has grown due to the passage of the Interlocutory Appeals Act of 1958 (28 U.S.C. § 1291(b)) and the 1963 amendment of Rule 54(b) of the Federal Rules of Civil Procedure. Additionally, supervisory mandamus pursuant to 28 U.S.C. § 1651 is being increasingly invoked.

Senior Circuit Judge Brown, in his dissent in the original panel's discussion, recognized the availability of these other remedies to avoid manifest injustice in reserving appeal until final judgment. Citing *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, he concurred with the

Court's reasoning that these alternate remedies discussed above are far more preferable than creating an exception for an entire class of interlocutory orders. (App. A-30)

This trend toward limiting the gulf in the finality doctrine created by the collateral order exception should be upheld by this Court. There is no need to review the instant motions to deny appointment of counsel before final judgment by the district courts.

III.

THE ADMINISTRATION OF JUSTICE WILL NOT BE AFFECTED IF THESE WRITS ARE DENIED.

Respondent has already stated the Court's view on piecemeal review of cases as stated in the *Firestone Tire & Rubber* case. Yet, Petitioners suggest that not allowing immediate appeal will cause delay, harm judicial administration, and affect the relationship between trial and appellate courts.

In fact, allowing immediate review of these interlocutory orders will foster a greater delay in the handling of matters before the already-overburdened district and circuit courts. Obviously, allowing this interlocutory appeal could lead to multiple appeals on the same case. Such a delay would have a profound and serious impact in terms of delaying the judicial process.

An order denying appointed counsel made at the institution of a lawsuit could be changed by the district court itself after pre-trial discovery and conferences.

Finally, there is no reason to assume the denial of counsel is so prejudicial to plaintiff's case, at the point in time it occurs, to justify stopping the judicial proces

to wait for an appellate decision which could be deferred until a final judgment occurs.

We should be mindful of the Court's language in the *Firestone Tire & Rubber* v. *Risjord* case, where it discussed the denial of interlocutory motions.

> "The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits." *Id.* at 377.

It is clear from these cases that to allow these appeals would be as disruptive to judicial administration as the alleged problems petitioners warn against in their brief.

In terms of the relationship of trial and appellate courts on this issue, it is evident that granting petitioners the requested relief would seriously tax the resources of the circuit courts of appeals.

As the Second Circuit stated in *Miller* v. *Pleasure*, 425 F.2d 1205 (2nd Cir.), *cert. denied*, 400 U.S. 880 (1970), overruling *Miller* v. *Pleasure*, 296 F.2d 283 (2nd Cir. 1961), *cert. denied*, 370 U.S. 964 (1962):

> "[T]he statement in *Roberts* v. *United States District Court* upholding the appealability of an order denying leave to proceed in forma pauperis is not truly apposite. Such an order closes the door to the courthouse to a plaintiff having a right to

> enter if he is indigent as he claims; an order declining to request an attorney to represent him simply denies an added facility in the prosecution of his claim which Congress has left to the discretion of the court. The growing burdens on the courts of appeals, with nearly three times as many appeals in 1969 as in 1960, requires [sic] us to look on appeals alleged to come under the 'collateral order' doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.* with greater care than a decade ago." *Id.* at 1205.

Such a pronouncement in 1970 as to the rigors of an expanding caseload has even more impact in 1985 given the ever-growing use of the judicial system.

IV.

THERE IS NO CIVIL RIGHTS EXCEPTION TO JUSTIFY GRANTING THESE WRITS.

Petitioners suggest that an exception be judicially created for civil rights litigation to allow immediate appeal of denial of counsel. The alleged harm resulting would be due to the complexities of this kind of litigation. Denial, petitioners maintain, would be the "death knell" of the case and result in significant rights not being pursued in the federal court system. It is clear that those arguments should be rejected by this Court.

The various civil rights acts in question provided for appointment of counsel within the court's discretion, 42 U.S.C. § 2000e-5(f)(1)(B); as well as the attorney fees recoverable from the losing party, 42 U.S.C. § 2000e-5(k). In doing so, Congress correctly set these kinds of cases apart and gave legislative authority for handling these matters outside the normal parameters of judicial rules.

Petitioners seek to expand these special rules judicially, totally bypassing the legislative process this Court endorsed in *Coopers & Lybrand* v. *Livesay, supra.*

There are simply no good reasons advanced by petitioners for expanding the role of the court in civil rights lawsuits. As this Court has said in *Coopers & Lybrand, supra,* the importance of the case is not a ground for allowing immediate appeal of interlocutory matters.

Coopers & Lybrand v. *Livesay, supra,* also dealt with the so-called "death knell" doctrine. The theory that not allowing immediate appeal of interlocutory orders, will cause the case to be dismissed or withdrawn, has been rejected by the Court in language which has direct application here.

> "Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 470, 477 (1978) (footnotes omitted).

V.

THERE WAS NO ABUSE OF JUDICIAL DISCRETION BY THE DISTRICT COURT IN *ARTELL HENRY* v. *CITY OF DETROIT MANPOWER DEPARTMENT.*

Motions for appointment of counsel under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1)(B), are subject to the discretion of the district court, there being no absolute right to such appointment. The lower court's decision to deny appointment of counsel for Plaintiff Henry is reviewable, ultimately, only for the purpose of determining whether the court abused its discretion. *Bradshaw* v. *Zoological Society of San Diego, et al.,*

662 F.2d 1301, 1318 (9th Cir. 1981). The district court judge in the case at hand exercised reasoned and well-informed judgment in denying Plaintiff's request for appointment of counsel, and as such is not subject to reversal or remand by an appellate body.

In considering appointment of counsel in civil cases, the factors weighed by the trial court differ significantly from those in which the person requesting an attorney is accused of a crime. In *Lassiter* v. *Department of Social Services*, 42 U.S. 18, 26-27; 68 L. Ed. 2d 640; 101 S. Ct. 2153 (1981), the Supreme Court discussed an indigent's right to counsel:

> "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel; and we thus drew from them that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured."

The Court held that the elements to be balanced in such a decision include the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. These elements must also be balanced against the presumption that there is a right to appointed counsel only where the indigent stands to lose his personal freedom. In the case at hand, Plaintiff Henry's interests are monetary, as are the government's. The risk of error in the trial of the lawsuit, as will be shown later, are slight. These general standards set forth in *Lassiter* are satisfied in the trial court's decision to deny appointment of counsel.

Another set of discretionary considerations which may be employed by the trial court in considering appointment of counsel for an indigent in a civil case is set forth in *Hudak* v. *Curators of the University of Missouri, et al.*, 586 F.2d 105, 106 (8th Cir. 1978). They include the feasibility of a contingent fee arrangement, the interest in the case paid by previously-contacted attorneys, the ability of the litigant to represent himself and the physical convenience for the litigant to represent himself. This lawsuit initiated by Plaintiff Henry, if successful, may merit an award of attorney fees and many law firms participate in contingency arrangements. The court has appointed attorneys for Plaintiff Henry on two occasions. Both times, the attorneys withdrew from the case, citing lack of merit. The trial court's discretion withstands this scrutiny.

Probably the most highly-cited standards for consideration of appointment of counsel in EEOC cases are set forth in *Caston* v. *Sears Roebuck & Co., Hattiesberg, Miss.*, at 556 F.2d 1305 (5th Cir. 1977). The court *suggests* at least three determinants:

1. Plaintiff's available financial resources;
2. Plaintiff's efforts to secure counsel; and
3. The merits of Plaintiff's EEOC claim.

The court in the *Henry* case considered these factors. Despite the findings of the two appointed attorneys that Plaintiff Henry's case has no merit, the court found the Plaintiff sufficiently stated a cause of action and that he should have an opportunity to present facts supporting his allegations. The court's decision to allow Plaintiff Henry to proceed *in pro per* was not an abuse of discretion under *Caston*.

The trial court carefully and consistently protected the Plaintiff from losing his cause of action to procedural technicalities inherent in civil rights claims.

Every *pro se* litigant is entitled to the patience and understanding of the court. This is particularly true in civil rights cases in this circuit. *Harris* v. *Walgreen's Distribution Center*, 456 F.2d 588, 590 (6th Cir. 1972); *Abram* v. *Wackenhut Corp.*, 493 F. Supp 1090, 1091 (1980); *Newson* v. *American Greetings Corp.*, 535 F. Supp 1389, 1390 (1982).

The trial court was most considerate of Plaintiff Henry's rights and situation through the course of this litigation. No abuse of discretion exists.

When the Panel of the Sixth Circuit decided that interlocutory orders denying appointment of counsel were immediately appealable, it also discussed the merits of each of the four consolidated cases. Specifically, the panel reviewed the *Henry* case on the issue of whether the district court abused its discretion in denying counsel.

The effect of that review in the *Henry* case was to give Petitioner Henry the immediate review he seeks here. The majority opinion of the Panel of the Sixth Circuit said:

> "As to *Henry* v. *City of Detroit*, we find no such abuse, since the District Judge already made good faith efforts to comply with the congressional purpose of providing counsel. The record in *Henry* indicates that two (possibly three) designations of counsel were made. There is no requirement that the District Judge, in seeking a lawyer to prosecute a civil rights claim on behalf of a person unable to pay, must either satisfy the desire (or whim) of the complainant in relation to such potentially charitable representation or order a lawyer to file a case which his investigation indicates is frivolous. The judgment of the District Court is affirmed." (Supp. App. A-18).

Respondent City of Detroit believes the issue of immediate appeal is singularly important to this case, as earlier sections of this brief indicate.

However, with respect to Petitioner Henry, he has already received his review on the issue of abuse of discretion and the lower court has been affirmed.

If the first issue in this matter is decided in favor of petitioners, Respondent City of Detroit submits that such review has already taken place at the Sixth Circuit and no further review is necessary in the *Henry* case.

Putting this matter in perspective, if the *Artell Henry* case was before this Court solely on the issue of abuse of discretion, it would certainly not merit review in this forum.

CONCLUSION

In view of the foregoing, the Court should deny the Writ of Certiorari requested herein.

Respectfully submitted,

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Dated: September 6, 1985

OPPOSITION

BRIEF

No. 85-237

In The

Supreme Court of the United States

October Term, 1985

ARTELL M. HENRY, *et al.*,
Petitioners,

v.

CITY OF DETROIT MANPOWER DEPARTMENT, *et al.*,
Respondents

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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September 3, 1985

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondents, *George Wilson, Al Parke and Dr. Wayne Hodge*, Kentucky Corrections Cabinet employees, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's *en banc* opinion in these consolidated cases.

REASONS FOR DENYING THE WRITS

I. THE COURT SHOULD DENY THE WRITS EVEN THOUGH THERE IS A CONFLICT AMONG CIRCUITS

Although the circuits are divided with respect to whether orders denying motions to appoint counsel for *pro se* civil litigants are immediately appealable, the question is not appropriate for Supreme Court review. The Court recently decided the case of *Richardson-Merrell, Inc. v. Koller*, U.S. _____, 86 L.Ed. 2d 340, 105 S. Ct. 2757 (1985) holding that an order disqualifying civil counsel was not immediately appealable. Due to the recency of that case, the circuits have not assessed the impact with respect to the issue of denial of appointment of counsel in civil cases. Since the circuits have not had the opportunity to assess the impact of that opinion, this issue is not ripe for consideration.

II. THE COURT SHOULD DENY THE WRITS BECAUSE ORDERS DENYING APPOINTMENT OF COUNSEL DO NOT FALL WITHIN THE COHEN DOCTRINE

An order denying appointment of counsel is not immediately appealable in that it is not a final order or a collateral order meeting the three-part *Coopers* test for applicability of the *Cohen* doctrine.[1] Such an order is not final, not separable from the merits of the case, and is effectively reviewable on appeal from a final judgment.

A. Finality

The denial of a request for appointment of counsel is not a final order. As the Sixth Circuit, *en banc*, pointed out, the request for appointment of attorney can be renewed and decided at a later date upon development of the case. Since an initial order denying appoint-

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[1] 28 U.S.C. § 1291 provides appellate courts with jurisdiction over final decisions of the lower court.
Coopers and Lybrand v. Livesay, 437 U.S. 463 (1978)
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)

ment of counsel is one which revision can be expecteed and considered as the litigation develops, the requirement of finality as called for in the *Coopers* case is not met. Appellate courts are not to second guess pre-judgment rulings of a district court judge and the occasional erroneous decision to deny appointment of counsel thus imposing additional litigation is not enough to set aside the finality requirement in § 1291.[2]

B. Separability

The denial of appointment of counsel is not completely separate from the merits of the action so as to meet the separability requirement of the *Coopers* test. *Richardson-Merrell, Inc.* (orders disqualifying counsel in civil cases are not immediately appealable). Since a factor to be considered by the trial court in addressing a motion to appoint counsel is the merits of the case, see *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977), appellate review of an order denying appointment would also have to consider the merits to determine if the lower court abused its discretion in failing to grant the application.

Although the existence of prejudice has never been a requirement for the reversal of an erroneous lower court ruling, the appellate court, in considering the denial of appointment of counsel, should not presume that prejudice results from such a denial. Since *pro se* litigants are given wide latitude by the courts, there should be no automatic presumption of prejudice when one proceeds without an attorney. *Haines v. Kerner,* 404 U.S. 519, 30 L.Ed. 2d 652, 92 S. Ct. 594 (1972); *Conley v. Gibson,* 355 U.S. 41, 2LEd. 2d 80, 78 S. Ct. 99 (1957).Therefore, the assessment of the impact of denial of appointment of counsel can only be done by the appellate court following consideration of the facts and merits of the case as presented by the *pro se* litigant. *Richardson-Merrell,* 86 L.Ed. 2d at 351. Since the merits of the case must be considered in determining whether the *pro se* person is prejudiced by denial of appointment of counsel, the denial is not completely separable from the merits of the action so as to meet the second prong of the *Coopers* test.

C. Effective Reviewability

If prejudice is to be presumed in an order denying the appointment of counsel, the order is then effectively reviewable upon final judgment

[2]*Richardson-Merrell, Inc.,* 86 L.Ed. 2d, 350 citing to *Cohen v. Beneficial Loan Corp.,* 337 U.S. at 546, 93 L.Ed. 1528, 69 S. Ct. 1221 and *Coopers v. Lybrand,* 437 U.S. at 476, and n 28, 57 L.Ed. 2d 351, 98 S. Ct. 2454; *Will v. United States,* 389 U.S. 90, 98, n 6, 19 L.Ed. 2d 305, 88 S. Ct. 269 (1967)

and the third prong of the *Coopers* test is not met in that the order is reviewable upon a final judgment on the merits. *Richardson-Merrell,* 86 L.Ed. 2d at 351-52; *Flanagan v. United States,* 465 U.S. ———, ——— *79 L.Ed. 2d 288,268, 105 S. Ct. 3476 (1974).* This order is not distinguishable from various pre-trial orders impacting on the litigant but which must await final judgment on the merits of review. *Flanagan,* 79 L.Ed. 2d, 298. Since the order can receive effective review after final judgment, it does not fall into the *Cohen* exception.

III. THE COURT SHOULD DENY THE WRITS BECAUSE IMMEDIATE REVIEW WOULD NOT SERVE THE NEEDS OF JUSTICE AND EFFECTIVE JUDICIAL ADMINISTRATION

The narrow exception to the final judgment rule created by the Court in *Cohen* should not be expanded to cover the denial of appointment of counsel. The narrow limited exception set out in *Cohen* should not be transformed into a "license for broad disregard of the finality rule imposed by Congress in Section 1291". *Firestone Tire and Rubber Company v. Risjord,* 449 U.S. 368, 66 L.Ed. 2d 571, 101 S. Ct. 669 (1980). With the courts already burdened by prisoner rights cases, to further expand the ability to immediately appeal denials of appointment of counsel would open the flood gates of litigation in this area.

Expansion of the narrow *Cohen* rule into this area would require an appellate court to repetitiously inquire into the same or similar legal issues. Since "most pre-trial orders of district judges are ultimately affirmed by appellate courts", an appelllate court would repeat the same review on final judgment as was done in the interlocutory appeal.[3] Minimization of appellate court interference with lower court decisions and reduction of costly, time-consuming piecemeal appeals which promotes effective judicial administration would be retained by limiting any further expansion of the narrow *Cohen* rule.

IV. DENIAL OF THE WRITS WILL NOT IMPACT ON PLAINTIFFS' ABILITY TO VINDICATE THEIR CIVIL RIGHTS

When a litigant proceeds *pro se,* wide latitude is given by the courts in the pleading filed by such a litigant. *Haines v. Kerner, supra; Conley v. Gibson, supra.* Although Congress did recognize in some instances the desire to appoint counsel, the actual appointment is left to the discretion of the trial court judge. Although orders denying appointment of

[3]*Richardson-Merrell, 86 L.Ed. 2d, 349 citing to 15 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure* § 3907, p. 433 (1976).

counsel may work hardships on the litigants, that is not a grounds for expanding the narrow collateral order rule.[4]

The majority of litigants would be able to vindicate civil rights violation without the assistance of an attorney. Each of the four litigants involved in these cases came to the appellate court without the help of an attorney. With the ability of *pro se* litigants to file an appeal and have the issue of denial of appointment of counsel addressed following on the merits, there is no need to expand the narrow *Cohen* doctrine any further.

V. THE DISTRICT COURT PROPERLY EXERCISED DISCRETION IN DENYING REQUESTS FOR APPOINTMENT OF COUNSEL

In the case of *Gordon v. Wilson* there was not an abuse of discretion with respect to the denial of appointment of counsel but rather, the record reflected that the district court judge had not reviewed a Magistrate's Order or an alternate request for appointment of a specific attorney. This case is indicative of one where an appeal proceeds prior to any final determination with respect to subsequent motions to appoint counsel.

CONCLUSION

The writs of certiorari should not issue to the United States Court of Appeals for the Sixth Circuit.

September 3, 1985

Respectfully submitted,

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[4] *Richardson-Merrell,* 86 L.Ed. 2d. 352, the Court acknowledged that an order disqualifying counsel may impose significant hardships on litigants but it would be a disservice to the Court, litigants and speedy justice to allow piecemeal litigation in every instance.

OPPOSITION

BRIEF

No. 85-237

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARTELL M. HENRY, ET AL., PETITIONERS

v.

CITY OF DETROIT MANPOWER DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an order denying a request for appointment of counsel in a civil case may be appealed under 28 U.S.C. 1291.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. B1-B32) is reported at 763 F.2d 757. The opinion of the panel (Pet. App. A1-A30) is reported at 739 F.2d 1109. The orders of the district courts (Pet. Supp. App. SA2-SA7) are unreported.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on May 22, 1985. The petition for a writ of certiorari was filed on August 12, 1985. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has invested district judges with the discretion to appoint counsel for parties in civil cases brought under Title VII of the Civil Rights of 1964, 42 U.S.C.

2000e-5(f)(1)(B).[1] Such discretion may likewise be exercised under 28 U.S.C. 1915(d) when a party is permitted to proceed in forma pauperis.[2] Petitioners are plaintiffs in civil rights cases consolidated in the court of appeals. Three of the four cases were brought under Title VII and the fourth was filed by a state prisoner pursuant to 42 U.S.C. 1983. In each case, the district court denied plaintiff's request for appointment of counsel.

2. All four plaintiffs appealed from the district courts' denial of appointed counsel. A divided panel of the United States Court of Appeals for the Sixth Circuit held that the district court orders were appealable under 28 U.S.C. 1291. The panel accordingly reached the merits, affirming the denial of appointed counsel in one case, reversing in another, and remanding the remaining two cases for further proceedings.

The panel opinion was subsequently vacated when the Sixth Circuit sat en banc to consider the issue. The full court held that orders denying motions for appointment of counsel are not final decisions under 28 U.S.C. 1291 and do not fall within the collateral order doctrine. The appeals were therefore dismissed. After analyzing the issue in light of this Court's decisions in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), and *Flanagan* v. *United States*, 465

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[1] 42 U.S.C. 2000e-5(f)(1)(B) provides:

> Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. * * *

[2] 28 U.S.C. 1915(d) provides:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

U.S. 259 (1984), the court of appeals held that none of the requirements of the collateral order doctrine were satisfied here. First, the court noted that the district court orders did not conclusively determine the disputed question since counsel could be appointed at a later stage if circumstances warranted; thus, the orders were not final. The court also concluded that the decision whether to appoint counsel in a civil case is not completely separate from the merits of the action and that effective review could be obtained on appeal from a final judgment.

ARGUMENT

The court of appeals correctly concluded that orders denying appointment of counsel in civil cases are not immediately appealable. Although the present case involves civil rights claims, it is not disputed that for purposes of appealability, there is no difference between Title VII and 28 U.S.C. 1915(d). (See Pet. 5 n.1.) Accordingly, the rule petitioners propose would not be limited to civil rights cases and would establish a regime of interlocutory appeals in all civil cases in which appointment of counsel is denied under Section 1915(d). Such a rule would be particularly burdensome to the government, which is frequently a defendant in the types of cases most likely to be litigated in proceedings in forma pauperis, such as social security benefits cases and prisoner complaints.

Although a conflict of authority presently exists in the courts of appeals, many of those decisions antedated this Court's most recent pronouncements on the collateral order doctrine. It may well be that when the courts of appeals have occasion to reconsider the issue in light of those recent decisions (including *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985)) that unanimity will supplant disagreement. In any event, prudence suggests that review by this Court could well await thorough ventilation in the

lower courts of *Richardson-Merrell* (decided one month after the court below entered its en banc judgment).

1. Because an order denying a motion for appointment of counsel obviously does not terminate the litigation, such an order is appealable only if it falls within the "collateral order" exception to the final judgment rule articulated by this court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978). To qualify as a decision excepted from the final judgment rule by *Cohen*, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468 (footnote omitted), citing *United States* v. *MacDonald*, 435 U.S. 850, 855 (1978) and *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

Although the Court has not addressed the precise question presented here, its recent decisions applying the collateral order doctrine in counsel representation cases provide ample guidance. In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the Court held that an order denying a motion to disqualify counsel in a civil case is not appealable. More recently, the Court held that pretrial disqualification of counsel is not appealable prior to a final judgment in a criminal case (*Flanagan* v. *United States*, 465 U.S. 259 (1984)), or a civil case (*Richardson-Merrell*). Taken together, these cases confirm that the collateral order doctrine is a " 'narrow exception' " to the finality rule imposed by Congress in Section 1291, applicable only to a " 'small class' of prejudgment orders." *Richardson-Merrell*, slip op. 6. For reasons this Court has often explained, orders denying appointment of counsel do not, as a class, warrant appellate intervention in ongoing district court proceedings.

2. The court of appeals found that the instant orders satisfied none of the *Cohen* requirements. For present purposes it will suffice to address only the third prong of the *Cohen* test: that the order be effectively unreviewable on appeal from a final judgment.[3] Petitioners contend (Pet. 8-10) that an erroneous refusal to appoint counsel will effectively terminate an action because plaintiffs, unable to proceed without counsel "will simply drop their complaints."[4] This is but a variation on the " 'death knell' " theory this Court rejected in *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 469-477. See *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 11 n.11 (1983) ("There is an obvious difference between a case in which the plaintiff himself *may choose* not to proceed, and a case in which the district court *refuses to allow* the plaintiff to litigate his claim in federal court."). As the

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[3]There is substantial doubt that the district court orders satisfy the requirement of being separable from the merits of the case. See *Miller* v. *Pleasure*, 425 F.2d 1205, 1206 (2d Cir.), cert. denied, 400 U.S. 880 (1970). Those courts of appeals that have permitted such interlocutory appeals have recited that "[t]hree factors are generally considered relevant in evaluating applications for appointment of counsel in Title VII cases: (1) the plaintiff's financial resources, (2) the plaintiff's efforts to secure counsel, and (3) *the merits of the discrimination claim.*" *Slaughter* v. *City of Maplewood*, 731 F.2d 587, 590 (8th Cir. 1984) (emphasis added); see *Bradshaw* v. *Zoological Society*, 662 F.2d 1301, 1318-1319 (9th Cir. 1981); *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305, 1309 (5th Cir. 1977). As this Court stated in *Richardson-Merrell* (slip op. 12): "[i]f a showing of prejudice is a prerequisite to reversal, then the ruling is not 'completely separate' from the merits because it cannot be assessed until a final judgment has been entered; on the other hand, if a showing of prejudice is not required, then the ruling can be effectively reviewed on appeal of the final judgment."

[4]There is no reason to accept the contradiction that underlies petitioners' premise: that pro se litigants will necessarily be "incapable of shouldering the most elementary burdens of a lawsuit" (Pet. 9), yet fully able to pursue an interlocutory appeal from the denial of appointed counsel.

Second Circuit has noted, the door to the courthouse is not closed in the present situation, because "an order declining to [appoint counsel] simply denies an added facility in the prosecution of his claim which Congress has left to the discretion of the court." *Miller* v. *Pleasure*, 425 F.2d at 1205. There is no warrant to assume that pro se plaintiffs, having embarked upon litigation without an attorney, will necessarily abandon the effort when the court denies a request for counsel. For those plaintiffs who do not proceed and whose claims are thus dismissed for lack of prosecution, the order of dismissal is a final judgment from which an appeal may be taken. See, *e.g.*, *Luna* v. *International Ass'n of Machinists*, 614 F.2d 529 (5th Cir. 1980). In other instances, dispositive motions under Rules 12 or 56, Fed. R. Civ. P., could lead to entry of final appealable decisions at an early stage in the proceedings. So the pro se plaintiff whose request for appointed counsel is denied is not inevitably left with the choice of abandoning his claim or going through a full trial without representation.

Nor is there any merit to petitioners' contention (Pet. 10-11) that a pro se litigant erroneously denied counsel could not have that error effectively corrected on appeal from a final judgment. See *Wood* v. *United States*, 389 U.S. 20 (1967) (appointment of counsel reviewed on appeal from final judgment in criminal case); *Flanagan* v. *United States*, 465 U.S. at 268 ("post-conviction review is concededly effective to the extent that petitioners' asserted right is like the Sixth Amendment rights violated when a trial court denies appointment of counsel altogether"). Unlike petitioners, we do not make the overly pessimistic assumption that federal courts are incapable of providing a remedy when a failure to appoint counsel leads to reversal of a judgment. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 376-378 (unparticularized speculation that proceedings would be "indelibly stamped" and a party's burden increased insufficient to render an order immediately

appealable). Rules 1, 8(f), 16 and 36(b), Fed. R. Civ. P., afford district courts flexibility and latitude to fashion such protective or remedial orders as needed to preserve a pro se plaintiff's opportunity to seek a fair trial of his claim. See also Rules 13(f), 15(a) and 15(d), 46, Fed. R. Civ. P. It is highly unlikely that a district court will fail to implement appropriate measures when a pro se case is reversed and remanded for failure to provide counsel. Newly-appointed counsel will presumably be quick to furnish suggestions for the course of future proceedings. Cf. *Jenkins* v. *Chemical Bank*, 721 F.2d 876, 880-881 (2d Cir. 1983).[5]

b. Petitioners misconstrue the function of appellate courts when they assert (Pet. 10) that plaintiffs cannot "be made whole" on appeal from a final judgment. See Rule 61, Fed. R. Civ. P. Similar arguments could be made for a myriad of other decisons a district judge makes on discovery, evidentiary and substantive issues. *Flanagan* and *Richardson-Merrell* present close analogs; when counsel of choice has been disqualified, tactical decisions made by substitute counsel, or by the litigant himself if he declines to or cannot obtain a second attorney, may limit strategies at a second trial. But all this shows nothing more than that the absence of an interlocutory appeal may work a hardship on a party that erroneously loses preliminary rulings. Having considered these potential hardships, however, Congress has concluded instead that the overall benefit to the legal system that results from the final judgment rule outweighs

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[5]Should the exceptional situation arise in which a district court refuses to appoint counsel without even considering its discretion to do so, immediate review may be available by writ of mandamus, or possibly by certification under 28 U.S.C. 1292(b). See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 378 n.13. Thus, the small category of cases that might warrant immediate review could be examined without the necessity of creating "a general rule permitting the appeal of all such orders." *Ibid.*

the harm to particular parties who must wait until proceedings in the district court have terminated. "Implicit in § 1291 is Congress's judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second guess pre-judgment rulings." *Richardson-Merrell*, slip op. 11.

c. There is no merit to petitioners' suggestion (Pet. 13-15) that the nature of their underlying claims — alleged civil rights violations — warrants an exception to the final judgment rule. Section 1291, of course, recites no such exception. And, on several recent occasions, this Court has rejected similar arguments for subordinating other rules of law to the goal of enforcing the civil rights laws. For example, in *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 156-159 (1982), the Court held that a private Title VII plaintiff seeking to maintain a class action must comply with the requirements of Rule 23, Fed. R. Civ. P. Similarly, the Court refused to find that Congress intended to exempt civil rights cases from the ordinary operation, under 28 U.S.C. 1738, of res judicata, *Migra* v. *Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-85 (1984); *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982); and collateral estoppel, *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980); and the operation of Fed. R. Civ. P. 68, *Marek* v. *Chesny*, No. 83-1437 (June 27, 1985), slip op. 5-9. In these cases, the Court held that plaintiffs seeking to vindicate the public policy of civil rights enforcement are governed by the same procedures as any other plaintiff. It is difficult to see why the result should be any different with respect to Section

1291's policy of promoting judicial efficiency by discouraging piecemeal appeals.[6]

d. Finally, there is no basis for the assumption (Pet. 11-13) that a rule barring immediate appeals in this context would lead to delay and inefficiency. As the First Circuit has recognized, the standard for review is "stringent," and therefore "denial of motions for appointment of counsel in § 1983 cases will rarely be reversed." *Appleby* v. *Meachum*, 696 F.2d 145, 147 (1983). This conclusion is consistent with this Court's more general statement in *Richardson-Merrell*, slip op. 9, that "[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts." For the reasons articulated in *Richardson-Merrell*, slip op. 10, "[w]e do not think that the delay resulting from the occasionally erroneous [denial of appointed counsel] outweighs the delay that would result from allowing piecemeal appeal of every order [denying appointment of] counsel."

In order to satisfy a district judge that counsel should be appointed in a civil case, a plaintiff must show that he has made a diligent effort to obtain counsel (see note 3, *supra*). Thus, by the time the request for counsel reaches the district court, the pro se plaintiff's claim has already been presented to the legal community without success in obtaining representation. Of course, plaintiff's failure to retain counsel does not establish that his claim has no merit. But, the statutory allowance of attorney's fees to the prevailing party in a Title VII or Section 1983 case and the availability of assistance from public interest or pro bono groups provide

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[6]In any event, as the court of appeals concluded (Pet. App. B11 (emphasis in original)) petitioners' argument fails to take into account the fact that 28 U.S.C. 1915(d) applies to noncivil rights cases as well: "[w]e do not believe that we should accept [petitioners'] invitation to establish a hierarchy of cases as a basis for immediate appealability of orders denying appointment of counsel. This is a legislative function, *see Coopers & Lybrand*."

further assurance that meritorious cases will be pursued. It is only when other statutory incentives have failed to attract representation that a pro se plaintiff can seek appointment of counsel as an exercise of the district court's discretion. This filtering process suggests that the number of meritorious cases in which district courts will err in failing to appoint counsel will be small.[7]

3. Although a conflict currently exists in the courts of appeals on this issue, the genealogy of that conflict—and the recent erosion of authority for the position petitioners espouse—leads us to conclude on balance that review is not warranted at this time.[8]

Despite expressing serious doubts, the Second Circuit was the first court of appeals to hold that an order denying appointment of counsel under 28 U.S.C. 1915(d) was

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[7]Petitioners greatly overstate the matter when they assert (Pet. 14-15) that "recent reported opinions reveal over twenty other examples of abuse of discretion in denials of requests for counsel." First, we note that in 16 of the 21 examples the appeals were from *final* judgments (eight of them after trial), thus demonstrating that the issue can await disposition on the merits in the district court. Second, in nine of the cases the courts of appeals did not find that it was error to refuse to appoint counsel, they merely remanded for the district courts to reconsider whether to make appointments. In another case, despite an error in failing to appoint counsel, the court of appeals found the error harmless because plaintiff's claims were frivolous. *Brown-Bey* v. *United States*, 720 F.2d 467 (7th Cir. 1983).

[8]In addition to the Sixth Circuit, the First, Second, Third, Seventh, and Tenth Circuits have held such orders not appealable. *Appleby* v. *Meachum, supra*; *Miller* v. *Pleasure, supra*; *Smith-Bey* v. *Petsock*, 741 F.2d 22 (3d Cir. 1984); *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981); *Cotner* v. *Mason*, 657 F.2d 1390 (10th Cir. 1981). There are internally conflicting cases within the Ninth Circuit. Compare *Kuster* v. *Block*, No. 84-5606 (Oct. 8, 1985), with *Bradshaw* v. *Zoological Society*, 662 F.2d 1301 (1981). Only the Fifth and Eighth Circuits continue to hold expressly that such orders are appealable. *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977); *Slaughter* v. *City of Maplewood*, 731 F.2d 587 (8th Cir. 1984).

immediately appealable. *Miller* v. *Pleasure*, 296 F.2d 283 (2d Cir. 1961), cert. denied, 370 U.S. 964 (1962). Nine years later, that same court reconsidered the issue and came to the opposite conclusion. 425 F.2d 1205 (1970). Several other circuits have undergone a like process. For example, in light of this Court's decision in *Firestone*, the Seventh Circuit overruled itself and held that orders denying appointment of counsel are not immediately appealable. *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064 (1981), overruling *Jones* v. *WFYR Radio*, 626 F.2d 576 (1980). Similarly, the Third Circuit held in *Smith-Bey* v. *Petsock*, 741 F.2d 22 (1984), that this Court's opinion in *Flanagan* had effectively overruled *Ray* v. *Robinson*, 640 F.2d 474 (3d Cir. 1981).

The message is clear. Both *Flanagan* and *Firestone* occasioned reassessments by the courts of appeals of the question presented in this petition. It can be anticipated that *Richardson-Merrell*, which more closely parallels the policies implicated here, will have the same effect. Indeed, the impact of *Richardson-Merrell* has already begun to be felt. On October 8, 1985, the Ninth Circuit — which had previously held otherwise in a Title VII case — held that it lacked jurisdiction to hear an interlocutory appeal from an order denying appointment of counsel in a Section 1983 case. *Kuster* v. *Block*, No. 84-5606 (9th Cir. Oct. 8, 1985). In so holding, the court relied on *Richardson-Merrell, Flanagan*, and *Smith-Bey*.

This shift of authority may presage further erosion in those circuits that have held orders denying appointment of counsel to be appealable. When the Fifth Circuit first held orders denying counsel appealable (*Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (1977)), it relied on a Second Circuit case that had been overruled seven years

earlier[9] and on a Third Circuit case (*Spanos* v. *Penn Central,* 470 F.2d 806 (3d Cir. 1972) that is no longer controlling. The Ninth Circuit followed *Caston* in *Bradshaw* v. *Zoological Society,* 662 F.2d 1301, 1305 (1981), also relying on the overruled Second Circuit case, on an overruled Seventh Circuit case,[10] and on a subsequently overruled Third Circuit case.[11] Thus, the court incorrectly concluded that "[o]nly the Tenth Circuit has held orders denying appointment of counsel * * * not appealable as final orders." 662 F.2d at 1305 n.11. This questionable precedential support was duplicated in *Slaughter* v. *City of Maplewood,* 731 F.2d 587, 589 (1984), in which the Eighth Circuit made no mention of *Flanagan*, decided almost two months earlier by this Court.

Given this pedigree, it is not clear that the present conflict will remain after the courts of appeals have an opportunity to analyze the issue with the further guidance of this Court's recent pronouncements. Having said this, we are mindful of the Fifth Circuit's decision in *Robbins* v. *Maggio*, 750 F.2d 405 (1985). In that case, the court of appeals anticipated this Court's holding in *Richardson-Merrell*, but a divided panel concluded nevertheless that orders denying appointment of counsel are appealable. The court of appeals did not have

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[9]The Fifth Circuit cited *Miller* v. *Pleasure*, 296 F.2d 283 (2d Cir. 1961), cert. denied, 370 U.S. 964 (1962). But that decision had already been overruled by the Second Circuit in *Miller* v. *Pleasure*, 425 F.2d 1205, cert. denied, 400 U.S. 880 (1970).

[10]The Ninth Circuit cited (662 F.2d at 1305 n.11) *Jones* v. *WFYR Radio, supra,* which had been overruled several weeks earlier in *Randle* v. *Victor Welding Supply Co, supra.*

[11]As noted above, the Ninth Circuit has apparently reconsidered this position. Although *Kuster* does not expressly overrule *Bradshaw*, it was not necessary to do so, since the panel in *Kuster* concluded that more recent decisions by this Court (*Flanagan* and *Richardson-Merrell*) mandated the result.

the benefit of this Court's analysis in *Richardson-Merrell*, nor did it have the benefit of the en banc decision of the Sixth Circuit. Of course, we cannot predict how the Fifth Circuit will respond when it next confronts the issue. Accordingly, we suggest it would be the better course to await the maturing of judgments on this issue. Should the conflict persist, this Court could decide at that time whether review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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Assistant Attorney General

NOVEMBER 1985

DOJ-1985-11

REPLY

BRIEF

No. 85-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTELL M. HENRY, *et al.*,

Petitioners,

—against—

CITY OF DETROIT MANPOWER DEPARTMENT, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

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November 25, 1985.

TABLE OF AUTHORITIES

No. 85-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTELL M. HENRY, *et al.*,
Petitioners,

-against-

CITY OF DETROIT MANPOWER DEPARTMENT, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

ARGUMENT

The Solicitor General and the other respondents concede that the circuits are divided on the central issue in this case. In fact, the disparate contentions of their briefs mirror the division among the circuits and are themselves compelling proof of the need for this Court to decide the issue now.

Three of the respondents, the Solicitor General, the State of Kentucky and Union Carbide, suggest that this Court should not hear this case now, but should give the circuits an additional

opportunity to assess the impact of this Court's opinion in *Richardson-Merrell, Inc. v. Koller,* 105 S.Ct. 2757 (1985), on the question of appealability. The fourth respondent, the City of Detroit, declines even to cite *Richardson-Merrell* as a reason for its opposition, obviously believing that the case does not control the result here.

To say, as three of the four respondents do, that *Richardson-Merrell* is controlling is seriously to misread that opinion. The fundamental and dispositive difference between *Richardson-Merrell* and the present suits is that in that case, the party whose counsel was disqualified will continue to be represented by qualified counsel, albeit not of her first choice, whereas here, petitioners will not be represented by *any* counsel *at all.* Prejudice may or may not ultimately result from the district court's ruling in *Richardson-Merrell;* here it is inevitable and presumed. It is merely wishful thinking to say that *Richardson-Merrell* provides the necessary guidance to the circuits. It does not.

On the contrary, the circuits cannot even decide what *Richardson-Merrell* means. Less than two months after *Richardson-Merrell* was decided, the Tenth Circuit, in *American Cable Publications, Inc. v. Chase Manhattan Bank,* No. 84-2273 (10th Cir. July 26, 1985), refused to apply it to an interlocutory appeal from an order disqualifying counsel (precisely the same situation as *Richardson-Merrell*), stating that the appellant had "no other adequate remedy available". In order to avoid the reach of *Richardson-Merrell,* the Tenth Circuit simply decided, *sua sponte,* to treat the appeal as an application for a writ of mandamus. Two weeks earlier, the Ninth Circuit reached the opposite result. *American Protection Insurance Co. v. MGM Grand Hotel—Las Vegas, Inc.,* 765 F.2d 925 (9th Cir. 1985).

On August 26, 1985, the Second Circuit in *Oneida of the Thames Band v. State of New York,* 771 F.2d 51 (2d Cir. 1985), declined to vacate a mandate reversing a district court's disqualification order (again, the same situation as *Richardson-*

Merrell) because the Supreme Court might later review the *Oneida* case itself and because "though we have no wish to burden the [Supreme] Court, we think the need to apply *Richardson-Merrell* to this litigation is . . . questionable . . .". And on September 13, 1985, the Federal Circuit, citing *Richardson-Merrell* with only a "*cf.*" citation signal, agreed to hear an interlocutory appeal from a disqualification order that had been certified under 28 U.S.C. § 1292(c)(1). *Sun Studs, Inc. v. Applied Theory Associates, Inc.,* 772 F.2d 1557 (Fed. Cir. 1985). If the circuits cannot decide what *Richardson-Merrell* means in the context of a disqualification motion, how can they be expected to apply it consistently to a case such as this?

In fact, the rift among the circuits on the issue here has widened since the petition was filed.

As the Solicitor General notes in his Opposition ("SG Opp."), the Ninth Circuit recently held in *Kuster v. Block,* 773 F.2d 1048 (9th Cir. 1985), that an appellate court lacked jurisdiction to hear an interlocutory appeal from an order denying counsel in a Section 1983 case because the second *Cohen* test ("separability") was not met. Thus, the Ninth Circuit now permits such appeals in Title VII cases (*Bradshaw v. Zoological Society of San Diego,* 662 F.2d 1301 (9th Cir. 1981), reaffirmed on May 1, 1985, in *Morgan v. Kopecky Charter Bus Co.,* 760 F.2d 919 (9th Cir. 1985)), but not in Section 1983 cases (*Kuster*). With all respect, it is hard to imagine a more illogical result. No other circuit has so held and the Eighth Circuit has explicitly held to the contrary. *Slaughter v. City of Maplewood,* 731 F.2d 587 (8th Cir. 1984).

Respondents' briefs are additionally at odds with each other. For example, only two of the respondents, the State of Kentucky and Union Carbide, agree with the Sixth Circuit that the orders here did not meet the first *Cohen* test because they did not "conclusively determine the disputed question". The Solicitor General declines to discuss the question (SG Opp. at

5) while the City of Detroit concedes in its Opposition ("Detroit Opp.") that the district court's order did "conclusively determine" the question (Detroit Opp. at 6).

The Sixth Circuit also held that the orders in question did not meet the second *Cohen* test because they were not "separate from the merits of the action". On this point, too, respondents cannot agree among themselves. The Solicitor General concedes that there is "substantial doubt" about the question (SG Opp. at 5 n.3); the State of Kentucky and Union Carbide conclude that the order is not completely separate from the merits; the City of Detroit admits that it is (Detroit Opp. at 6-7).

All respondents argue that the orders are not "effectively unreviewable" on final appeal.[1]

But there has not always been such unanimity. The Solicitor General now takes a position flatly contrary to that of the Equal Employment Opportunity Commission ("EEOC"), the government agency charged with primary responsibility for administering, interpreting and enforcing federal employment discrimination statutes. The EEOC filed an *amicus curiae* brief in the Sixth Circuit in support of petitioners. The contrast between the position of the Solicitor General in this Court and the position of the EEOC below is breathtaking. Below, the EEOC concluded that:

> "If a plaintiff is forced to proceed to final judgment without counsel in a civil rights case, *there is great likelihood that he will make errors which will prevent him from ever obtaining relief*. . . . Even if the *pro se* plaintiff ultimately prevails, *the inevitable delay will severely undermine the effectiveness of any relief that may ultimately be rewarded.*" (Brief of the EEOC as *Amicus Curiae* at 13; emphasis added.)

and:

> "Furthermore, should the Title VII plaintiff take an appeal from the order after judgment, he will be placed in an untenable position. In an order to establish that he was harmed by the order he may have to show that his own conduct of the litigation caused him to lose his case (citations omitted). . . . [A]ssuming a *pro se* plaintiff succeeds in obtaining a new trial with appointed counsel after an appeal from judgment on the merits, *this remedy will not adequately redress the injury caused by erroneous denial of counsel.*" (*Id.* at 13-14; emphasis added.)

and:

> "Congress, in enacting Title VII, made the eradication of employment discrimination a high national priority, . . . To that end, Congress determined that discriminatees should receive prompt redress of their injuries and that indigent plaintiffs should not suffer from an inability to obtain counsel. Section 1291 was intended to avoid the waste of judicial resources inherent in piecemeal appeals which place appellate courts in the position of supervising, rather than reviewing, the actions of district courts. *Where counsel is improperly denied, immediate appeal avoids the delay in an award of relief and the waste of judicial resources inherent in a meaningless trial.* On the other hand, where plaintiffs are properly denied appointed counsel, judicial economy will be served by permitting an appeal. An affirmance based on failure to make a minimal showing of merit as required by 2000e-5(f)(1) may well cause a plaintiff to abandon his case because the pointlessness of proceeding should become clear." (*Id.* at 18-19; emphasis added.)

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[1] Even the Solicitor General, however, is uncomfortable with the result below as it applies to petitioners Cox, Parrish and Gordon. In their cases, the district courts did not even consider their discretion to appoint counsel. The Solicitor General concedes that such cases are among a "small category of cases that might warrant immediate review" but urges that review may be available by writ of mandamus or by certification under 28 U.S.C. § 1292(b) (SG Opp. at 7 n.5). He does not explain, however, how an unrepresented plaintiff will know how to avail himself of such extraordinary and highly technical appellate remedies nor does he guarantee that the courts of appeal will grant such highly discretionary relief. Moreover, it is absurd to believe that a district court, having refused even to exercise its discretion, would nevertheless grant a Section 1292(b) certificate.

The EEOC's reasoning is correct and nothing in *Richardson-Merrell* diminishes its compelling logic.

* * *

Two other points, both made in the Solicitor General's Opposition, deserve a brief response.

First, we do not contend that there should be a special "civil rights exception" to the final judgment rule, as the Solicitor General says we do (SG Opp. at 8). What we said was that the rule for which we contend is especially necessary in order to vindicate the rights of *pro se* civil rights plaintiffs, for whom Congress has mandated a special concern. The rule does, however, have a particular impact on civil rights plaintiffs since almost 70% of all *pro se* civil complaints in the federal courts are civil rights complaints,[2] and since virtually all of the requests for the appointment of counsel occur in civil rights cases. In theory, the rule for which we contend applies to all denials of counsel; in practice it will affect civil rights plaintiffs with special force.

Second, in response to our argument that after a full trial without counsel a *pro se* plaintiff might find himself irreparably damaged (a position shared by at least three circuits), the Solicitor General blithely states that "it is highly unlikely that a district court will fail to implement appropriate measures when a *pro se* case is reversed" and "newly-appointed counsel will presumably be quick to furnish suggestions . . ." (SG Opp. at 7).

In other words, the Solicitor General says that one should not worry, it will *probably* all work out for the best. He misses the point. The law today in every circuit *permits* the very use of prior proceedings that the Solicitor General says he is confident

[2] This statistic is based on actual figures for the Southern District of New York for 1984-1985 supplied to counsel for petitioners by the *pro se* staff attorney of the U.S. District Court for the Southern District of New York.

will not occur. We respectfully suggest that the Solicitor General be asked whether he would be prepared now to concede that whenever the federal government is a defendant in a case reversed for failure to appoint counsel—as petitioner Parrish's almost certainly will be—the government will not use in the second trial, for impeachment or otherwise, any of the proceedings from the first trial. One doubts that he would.

* * *

This case represents a classic example of a case that this Court ought to review—a case presenting a central issue of great importance to judicial and appellate administration, one with respect to which the circuits—and the respondents themselves—are hopelessly deadlocked.

Indeed, it is difficult to posit a case in which certiorari is more appropriately granted and more desperately needed. This case presents a rare and perhaps unique opportunity for the Court to decide this issue in a context in which the *pro se* petitioners are already represented by qualified counsel on appeal, in which the issue can be decided both in the context of Title VII and Section 1983, and in which, because of the Sixth Circuit's panel decision, later overruled by the full Sixth Circuit, there has already been an appellate ruling explicating the district courts' abuse of discretion on the merits. The issue is not only ripe for review, it will probably never again be presented to this Court in such a fully litigated and briefed form. If this Court is ever to decide the issue, we respectfully submit that the time is now and this is the case in which to do it.

Conclusion

For the reasons stated herein and in the petition for writs of certiorari, the writs should be granted.

November 25, 1985.

Respectfully submitted,

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OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

ARTELL M. HENRY ET AL. *v.* CITY OF DETROIT MANPOWER DEPARTMENT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85–237. Decided December 16, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue presented in this case is whether an order denying a civil rights plaintiff's motion for appointment of counsel is a final decision appealable as a matter of right under 28 U. S. C. § 1291. Three among petitioners are Title VII plaintiffs who moved for and were denied appointment of counsel pursuant to 42 U. S. C. § 2000e–5(f)(1)(B); a fourth petitioner, a plaintiff in an action under 42 U. S. C. § 1983, moved for and was denied appointment of counsel pursuant to 28 U. S. C. § 1915(d). Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, which dismissed the appeals on the grounds that the orders denying appointment of counsel are not final for purposes of 28 U. S. C. § 1291. 763 F. 2d 757. This decision, while not without support among the Courts of Appeals, conflicts with the decisions in *Caston* v. *Sears, Roebuck, & Co.*, 556 F. 2d 1305 (CA5 1977) (order denying appointment of counsel pursuant to § 2000e–5(f)(1)(B) is final for purposes of § 1291), and *Slaughter* v. *City of Maplewood*, 731 F. 2d 587 (CA8 1984) (to the same effect). I would grant certiorari to resolve this conflict among the Courts of Appeals on this plainly recurring question.